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Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO

No. 7562

Vol 1882

United States Circuit Court of Appeals

For the Ninth Circuit.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Appellant.

vs.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, deceased,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Superior Court of the State of California in and for the County of Shasta.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a Corporation,

Defendant.

COMPLAINT.

Plaintiff complains of defendant and for cause of action alleges:

I.

That during all the times and dates herein mentioned, the above named defendant has been and now is a corporation duly organized, existing and entitled to transact business in the State of California, and is transacting business in said State of California.

II.

That George R. Halcomb, also known as George Raymond Halcomb, died in the county of Shasta, State of California, on or about the 7th day of July, 1932, and left an estate in said County of Shasta. That after proceedings were duly had and taken in the Superior Court of the State of California, in and for the county of Shasta, Amos Halcomb was appointed Administrator of the estate of George R. Halcomb, also known as George Raymond Hal-

comb, and thereafter duly qualified as such Administrator.

III.

That during all the times and dates herein mentioned the above named plaintiff, Amos Halcomb, has been and now is the duly appointed, qualified and acting administrator of the estate of George R. Halcomb, also known as George Raymond Halcomb, deceased.

IV.

That on or about the 13th day of April, 1928, at and in the city of Redding, county of Shasta, State of California, and for a valuable consideration the above named defendant executed [1*] and delivered to George R. Halcomb, also known as George Raymond Halcomb, its policy of insurance in writing, a copy of which said policy is hereunto attached, marked "Exhibit A", and by this reference made a part hereof, and by said policy insured the life of the said George R. Halcomb, also known as George Raymond Halcomb to the amount and in the sum of $2000. Said policy provided, and said defendant agreed that in the event that said George R. Halcomb also known as George Raymond Halcomb, should meet his death as the result directly and independently of all other causes, by bodily injuries sustained through external, violent, and accidental means, provided:

(1) That such death shall have occurred while said policy and the Supplementary Contract were

*Page numbering appearing at the foot of page of original certified Transcript of Record.

in full force and prior to the anniversary date of said policy nearest to the 65th birthday of the insured, and

(2) That all premiums under said policy and the Supplementary Contract shall have been duly paid, and

(3) That said policy shall not be in force by virtue of any non-forfeiture provisions thereof.

In which event and in accordance with the terms of "Exhibit A", said defendant agreed to pay to the person or persons entitled thereto by virtue of the terms of said policy double the amount of said $2,000. or $4,000.

V.

That Sadie Mae Halcomb, wife of George R. Halcomb, also known as George Raymond Halcomb, is the beneficiary named in said policy, to whom the benefits thereof are due, owing and unpaid.

VI.

That said beneficiary, Sadie Mae Halcomb predeceased George R. Halcomb, also known as George Raymond Halcomb, and by reason thereof the benefits of said policy under and pursuant to the terms thereof are payable to plaintiff herein as administrator of the estate of George R. Halcomb, also known as George Raymond Halcomb. That George R. Halcomb, also known as George [2] Raymond Halcomb died on or about the 7th day of July, 1932 as a result of an aeroplane accident. He, the said George R. Halcomb, also known as George Raymond Halcomb, together with his wife, being

fare paying passengers in said plane, at the time of the accident, injuries and death.

VII.

That subsequent to the death of George R. Halcomb, also known as George Raymond Halcomb, and in accordance with the terms of said policy plaintiff duly notified said defendant and made proof of death in accordance with the terms and conditions of said policy of insurance, and said plaintiff has duly performed all of the terms and conditions of said policy on his part to be performed and said policy was in full force and effect at the time of the injury and death of the said George R. Halcomb, also known as George Raymond Halcomb.

VIII.

That said defendant has failed, neglected and refused, and still fails, neglects and refuses to pay said plaintiff the sum of $4000. as provided in said policy, or any part thereof, and there is now due, owing and unpaid from defendant to plaintiff the sum of $4,000. lawful money of the United States, together with interest thereon.

Wherefore, plaintiff prays judgment against said defendant for the sum of $4,000. and interest, together with costs of suit incurred herein, together with such other and further relief as to the court may seem just and equitable in the premises.

AMOS HALCOMB

Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb.

L. C. SMITH

Attorney for plaintiff. [3]

State of California
County of Shasta.—ss.

Amos Halcomb, as Administrator of the estate of George R. Halcomb, also known as George Raymond Halcomb, deceased, being first duly sworn deposes and says: That he is the plaintiff in the above entitled action, and has read the above and foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes the same to be true.

AMOS HALCOMB

Subscribed and sworn to before me this 10th day of September, 1932.

L. C. SMITH

Notary Public in and for the County of Shasta, State of California. [4]

EXHIBIT "A"

The Light That Never Fails.

METROPOLITAN LIFE INSURANCE COMPANY

A Mutual Life Insurance Company — Incorporated By The State of New York.

HEREBY INSURES THE LIFE OF GEORGE R HALCOMB

herein called the Insured, in accordance with the terms of this Policy No. 1253695 A and promises to

pay at its Home Office in the City of New York Two Thousand Dollars to Ida J. Halcomb, Mother of the Insured, Beneficiary, upon receipt of due proof of the death of the Insured and upon the surrender of this Policy. The right on the part of the Insured to change the Beneficiary, in the manner hereinafter provided, is ——reserved.

This Policy is issued in consideration of the Application therefor, copy of which application is attached hereto and made a part hereof, and of the payment for said insurance on the life of the above named Insured, of Thirteen Dollars and two cents (which maintains this Policy in force for a period of 3 months from its date of issue, as set forth below) and of the payment hereafter of a like ¼ annual premium on each 13th day of April, July, October and January (hereinafter called the due date), until Twenty full years Premiums shall have been paid or until the prior death of the Insured.

The Provisions and Benefits printed or written by the Company on the following pages are a part of this Policy as fully as if recired over the signatures hereto affixed.

In Witness Whereof, the Metropolitan Life Insurance Company has caused this Policy to be executed this 13th day of April, 1928, which is the date of issue of this Policy.

JAS. S. ROBERTS
Secretary

HARRY FISKE
President

[5]

S. Sharpe
Policy Registrar
LIMITED PAYMENT LIFE.
Age 21
Premiums payable for 20 years or until prior death.
Insurance payable at death only.
Annual distribution of Divisible Surplus.
*Form 808 -A Ord.

PROVISIONS AND BENEFITS.

1. Payment of Premiums:—All premiums are payable, on or before their due dates, at the Home Office of the Company, or to an authorized Agent of the Company, but only in exchange for the Company's official premium receipt signed by the President, Vice-President, Actuary, Treasurer or Secretary of the Company and countersigned by the Agent, or other authorized representative of the Company receiving the premium.

The payment of a premium shall not maintain this Policy in force beyond the due date when the next premium is payable, except as hereinafter provided.

If the premium shall have been paid for the period during which the death of the Insured occurs, then, if such period be greater than one month, the Company will pay, in addition to the amount otherwise payable under this Policy, that portion of such premium applicable to the policy month or months subsequent to the policy month when death occurred. A grace period of thirty-one days, without interest charge, will be granted for the payment

of every premium after the first, during which grace period the insurance shall continue in force, but if the Insured dies during such period the portion of the unpaid premium for insurance of the current policy month shall be considered as an indebtedness to the Company for which this policy is security.

On written request of the Insured, approved by the Company [6] at its Home Office, premium payments may be changed, at any anniversary of the date of issue of this Policy, so as to be payable annually, semi-annually, or quarterly in accordance with the published rates in force at the date of issue of this Policy.

2. Age:—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

3. Incontestability:—This Policy shall be incontestable after it has been in force for a period of two years from its date of issue, except for nonpayment of premiums, and except as to provisions and conditions relating to benefits in the event of total and permanent disability, and those granting additional insurance specifically against death by accident, contained in any supplementary contract attached to and made part of, this Policy.

4. Entire Contract:—This Policy and the application therefor constitute the entire contract between the parties, and all statements made by the Insured, shall, in the absence of fraud, be deemed

representations and not warranties, and no statement shall avoid this Policy or be used in defense of a claim hereunder unless it be contained in the application therefor and a copy of such application is attached to this Policy when issued.

5. Suicide:—If the Insured within one year from the date of the issue hereof die by his own hand or act, whether sane or insane, the liability of the Company hereunder shall be limited to an amount equal to the premiums which have been received, without interest.

6. Change of Beneficiary:—When the right to change the beneficiary is reserved, and if there be no written assignment of this Policy on file with the Company, the Insured may (while this Policy is in force) designate a new beneficiary, with or without reserving the right of change thereafter, by filing [7] written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement. Such change shall take effect upon endorsement of the same on this Policy by the Company. If any beneficiary shall die before the Insured, the interest of such beneficiary shall vest in the Insured, unless otherwise provided herein.

7. Assignment:—No assignment of this Policy shall be binding upon the Company unless it be executed upon blanks furnished by the Company and filed with the Company at his Home Office in the City of New York. The Company assumes no obligation as to the validity and sufficiency of any assignment.

8. Agents:—No Agent is authorized to waive forfeitures, to alter or amend this Policy, to accept premiums in arrears or to extend the due date of any premium.

9. Options on Surrender or Lapse:—After premiums for two full years shall have been paid on this Policy, the Owner hereof or the Assignee of record; if any, upon written request filed with the Company at its Home Office, together with the presentation of this Policy for legal surrender or endorsement within three months after the due date of any premium in default, shall be entitled to one of the following options:

(a) Cash Surrender Value—

To receive the Cash Surrender Value which shall be the Reserve on this Policy (omitting fractions of a dollar per thousand of insurance) and on any outstanding Paid-up Additions at due date of premium in default, less a surrender charge during the second and third policy years of not more than two and one-half per cent of the amount of insurance under this Policy. The Company shall deduct from such Cash Surrender Value any indebtedness to the Company for which this Policy is security, the remainder being hereinafter referred to as the "net sum", or, [8]

(b) Paid-Up Whole Life Insurance—

To have the Insurance continued in force from the due date of premium in default for a reduced amount of non-participating Paid-Up Whole Life Insurance, payable at the same time and under

the same conditions as this Policy. Such Paid-Up Whole Life Insurance shall be for such an amount as the net sum described under (a) above will purchase (in even dollars) at the then attained age of the Insured when applied as a net single premium. Such Paid-up Whole Life Insurance may be surrendered at any time for its then Cash Surrender Value (viz., its full Reserve at the date of such surrender less any indebtedness to the Company on such Paid-up Whole Life Insurance) or,

(c) Paid-up Term Insurance—

To have the Insurance continued in force from the due date of premium in default as non-participating Paid-up Term Insurance. If there be no indebtedness to the Company for which this Policy is security, the amount of such Paid-up Term Insurance shall be equal to the amount of insurance under this Policy, plus any outstanding Paid-up Additions, and for a term (in years and whole number of months) such as the Cash Surrender Value as defined under (a) above will purchase at the then attained age of the Insured when applied as a net single premium. If there be any such indebtedness the amount of the Paid-up Term Insurance will be reduced in such proportion as the indebtedness bears to the Cash Surrender Value as defined under (a) above. Such Paid-up Term Insurance may be surrendered at any time for its then Cash Surrender Value (viz., its full Reserve value at the date of surrender).

In the event of default in the payment of any premium, after premiums for two full years shall

have been paid on this Policy, if the Owner or the Assignee of record, if any, shall not avail himself of one of the foregoing options, in the manner hereinbefore provided, within three months after the due date [9] of the premium in default, this Policy will be continued by the Company for a reduced amount of non-participating Paid-up Whole Life Insurance, as provided under Option (b) above.

The Company, at its discretion, may defer the payment of any Cash Surrender Value under Options (a) (b) or (c) as above for a period not exceeding ninety days after the application therefor is received by the Company.

The Reserve held for this Policy and for any Paid-up Additions and the Net Single Premiums mentioned above, shall be computed upon the American Experience Table of Mortality with interest at three and one-half per centum per annum.

10. Reinstatement:—If this Policy shall lapse in consequence of default in payment of any premium, it may be reinstated at any time, unless the Cash Surrender Value has been paid or the non-participating Paid-up Term Insurance period has expired, upon the production of evidence of insurability satisfactory to the Company and the payment of all overdue premiums with interest at six per centum per annum to the date of reinstatement. Any loan which existed at date of default, together with interest at the same rate to the date of reinstatement, may be either repaid in cash, or

if not in excess of the cash value at date of reinstatement, continued as an indebtedness for which this Policy shall be security.

808-A Ord. -4-26

TABLE OF GUARANTEED LOAN VALUES AND SURRENDER OPTIONS

Computed in accordance with Paragraph 9 for a Policy free from indebtedness and without paid-up additions.

End of Year	Cash Value or Loan Value	Paid-Up Non-Participating Whole Life Insurance	Paid-Up Non-Participating Term Insurance Continued for Years	Months
2	$ 23	$ 77	3	1
3	39	130	5	6
				[10]
4	$ 60	$193	8	8
5	76	242	11	5
6	93	292	14	4
7	111	341	17	6
8	129	391	20	8
9	149	441	23	8
10	169	491	26	4
11	189	542	28	8
12	211	592	30	8
13	234	643	32	5
14	257	693	34	0
15	281	744	35	6
16	307	795	37	0
17	333	846	38	7
18	360	897	40	6

End of Year	Cash Value or Loan Value	Paid-Up Non-Participating Whole Life Insurance	Paid-Up Non-Participating Term Insurance Continued for Years	Months
19	389	949	43	2
20	419	Policy	Life	
25	466	Paid-up		
30	520	Participating		

For each $1,000 of the amount of insurance. For each $1,000 of the amount of insurance. Face amount of policy continued for period specified.

If the amount of the insurance is in excess of $1,000, the Loan, Cash and Paid up Values, as shown in the table, will be proportionate. Ord. 20 Pay Life Age 21

The values shown in the above table are for complete policy years, with surrender charge, if any, deducted. Values for later years will be computed upon the same basis and furnished on request.

Should default in payment of any premium occur at any other time than at the anniversary date of the Policy, the values for the end of the preceding policy year shall be increased in an amount or for a period equal to one-twelfth of the increase in value for the then current policy year, according to the above table, for each twelfth of such year for which premiums shall have been paid. [11]

The Cash Surrender Value at any time other than at the end of the period for which premiums have been paid shall be the Cash Surrender Value at the end of such period less interest from the date of payment to the end of such period at the rate of six per cent per annm.

The Loan Values provided for in the above table for the end of a policy year can be obtained at any time during such policy year in the manner and according to the following clause entitled "Loans".

11. Loans:—At any time after premiums for two full years shall have been paid and while this policy is in force, except when continued as nonparticipating Paid-up Term Insurance, the Company, on proper and lawful assignment of this Policy and presentation of it for endorsement will loan to the Owner or the Assignee of record, if any, on the sole security thereof, an amount not greater than the Cash Surrender Value at the end of the current policy year. Any indebtedness to the Company on this Policy, at the date of said loan, together with interest in advance on said loan to the end of the current policy year and any unpaid premium or premiums for the current policy year, will be deducted from the amount of said loan. Said loan will bear interest at the rate of six per centum per annum payable annually on each anniversary of this Policy. If interest be not paid when due, it shall be added to the principal, until the entire outstanding indebtedness shall equal the Cash Sur-

render Value, in which event this Policy shall become null and void, after one month's notice shall have been mailed by the Company to the last known address of the Insured and of the Assignee of record, if any. After the expiration of the premium payment period, or when this Policy is continued for a reduced amount of non-participating Paid-up Whole Life Insurance, payment of interest on any loan each year, in advance, to the end of the current policy year, will be required. At the option of the Company, the granting of a loan may be deferred for a period [12] not exceeding ninety days after application therefor is received by the Company, unless such loan is to be applied solely to the payment of premiums due to the Company. At any time while this Policy is in force the whole of any part of such indebtedness may be repaid. At the death of the Insured any such indebtedness to the Company shall be deducted from the amount payable hereunder.

12. Participation in Divisible Surplus:—This Policy is a participating contract while in force as a premium-paying policy, or as a policy fully paid up by completion of the payment of the full number of premiums specified herein, and the Company will annually, as of the thirty-first day of December of each year, ascertain and apportion any divisible surplus accruing hereon. (See "Notice to Policy-holder" below.) Such divisible surplus will be payable on the next anniversary of this Policy following the next succeeding thirtieth day of April,

and may, at the option of the Insured, or of the Assignee, of record, if any, be either (a) paid in cash, or, (b) applied within the grace period towards the payment of any premium or premiums; or (c) applied to the purchase of a participating paid-up addition to the sum insured; or, (d) left to accumulate to the credit of this Policy at such rate of interest as the Company may declare on such funds, but not less than 3½ per centum per annum, and payable at maturity of this Policy or withdrawable in cash on any anniversary date of this Policy. If no other option is selected by the Insured, or by the Assignee of record, if any, within three months after the date when such divisible surplus is payable, then the divisible surplus will be applied to the purchase of a Paid-up addition to the sum insured. Such paid-up addition may be surrendered at any time for a cash value at least equal to the amount of the surplus originally applied to its purchase. [13]

NOTICE TO POLICY-HOLDER.—The divisible surplus accruing under policies of this class will probably not be sufficient to enable the Company to make any apportionment under this Policy before the end of the third year.

13. Optional Modes of Settlement:—Upon written election made to and accepted by the Company, in accordance with the provisions hereinafter contained, the whole or any part of the amount payable according to the terms of this Policy, will, upon receipt of due proof of the death of the Insured,

be retained by the Company and paid out according to one of the following OPTIONS:

Option 1. (Interest Payments.) By the payment of Interest, either annually, semi-annually or monthly, at the rate of three and one-half per centum per annum on said amount so to be retained by the Company, the first Interest payment being payable at the end of one year, six months, or one month respectively according to the mode of interest payment elected, and by the payment upon the death of the payee, or at the end of a certain number of years, as specified in said written election, of the amount so to be retained by the Company, together with any accrued Interest, to such payee, or to the person designated in said election; or, if there be no person so designated, to the executors or administrators of such payee.

Option 2. (Installment Payment.) By the payment of equal annual or semi-annual instalments during a number of years certain in accordance with the Table below for each one thousand dollars of the amount so to be retained by the Company, the first Installment being payable immediately.

[14]

OPTION 2—INSTALMENT PAYMENTS

Number Years Specified	Amount of each Annual Instalment	—or—	Amount of each Semi-annual Instalment	Number Years Specified	Amount of each Annual Instalment
1	$1,000.00		$504.34	16	$79.88
2	508.60		256.54	17	76.38
3	344.86		173.98	18	73.26
4	263.04		132.72	19	70.48

Number Years Specified	Amount of each Annual Instalment	—or—	Amount of each Semi-annual Instalment	Number Years Specified	Amount of each Annual Instalment
5	$214.00		$107.98	20	$67.98
6	181.32		91.52	21	65.74
7	158.02		79.76	22	63.70
8	140.56		70.96	23	61.86
9	127.00		64.12	24	60.16
10	116.18		58.66	25	58.62
11	107.34		54.22	26	57.20
12	99.98		50.50	27	55.90
13	93.78		47.38	28	54.68
14	88.48		44.70	29	53.56
15	83.90		42.40	30	52.54

or

Amount of Each Semi-annual Instalment
$40.38
38.60
37.02
35.62
34.38
33.24
32.22
31.28
30.44
29.66
28.94
28.28
27.68
27.12
26.60

OPTION 3. (Life Income)—By the payment of equal annual Instalments for a fixed period of either ten or twenty years, and for so many years longer as the payee shall survive, in accordance with the Table below for each one thousand dollars of the amount to be so retained by the Company, the first Instalment being payable immediately.

[15]

OPTION 3—LIFE INCOME.

Age of Payee When Policy Becomes Payable	AMOUNT OF EACH INSTALLMENT Fixed Period of 20 years	Fixed Period of 10 years	Age of Payee When Policy Becomes Payable
10 and	$43.24	$44.46	33
11 under	43.40	44.64	34
12	43.58	44.82	35
13	43.76	45.02	36
14	43.94	45.22	37
15	44.14	45.44	38
16	44.34	45.66	39
17	44.54	45.90	40
18	44.78	46.14	41
19	45.00	46.40	42
20	45.24	46.68	43
21	45.50	46.96	44
22	45.76	47.26	45
23	46.04	47.56	46
24	46.32	47.90	47
25	46.64	48.24	48
26	46.94	48.60	49
27	47.28	48.96	50

Age of Payee When Policy Becomes Payable	AMOUNT OF EACH INSTALLMENT Fixed Period of 20 years	Fixed Period of 10 years	Age of Payee When Policy Becomes Payable
28	$47.02	$49.36	51
29	47.98	49.78	52
30	48.36	50.22	53
31	48.76	50.68	54
32	49.16	51.16	55

AMOUNT OF EACH INSTALMENT		Age of Payee When Policy Becomes Payable	AMOUNT OF EACH INSTALMENT	
Fixed Period of 20 Years	Fixed Period of 10 years		Fixed Period of 20 years	Fixed Period of 10 years
$49.60	$51.68	56	$63.44	$75.18
50.04	52.22	57	64.00	76.88
50.52	52.78	58	64.54	78.66
51.00	53.38	59	65.04	80.50
51.50	54.02	60	65.50	82.38
52.02	54.68	61	65.92	84.30
52.58	55.38	62	66.30	86.28
53.14	56.14	63	66.64	88.28
53.72	56.92	64	66.94	90.30
54.32	57.74	65	67.20	92.32
54.92	58.62	66	67.40	94.34
55.56	59.54	67	67.50	96.36
56.20	60.52	68	and over	98.34
56.86	61.56	69	Same as 67	100.28
57.54	62.64	70		102.18
58.20	63.78	71		104.00
58.88	64.98	72		105.74
59.56	66.24	73		107.38
60.24	67.56	74		108.92

AMOUNT OF EACH INSTALMENT		Age of Payee When Policy Becomes Payable	AMOUNT OF EACH INSTALMENT	
Fixed Period of 20 Years	Fixed Period of 10 years		Fixed Period of 20 years	Fixed Period of 10 years
60.92	68.96	75		110.32
61.58	70.42	76		111.60
62.22	71.94	77		112.74
62.84	73.52			and over
				same as 77

[16]

Any Instalments payable under Option 2, or any instalments for the fixed period of ten or twenty years, as the case may be, under Option 3, which shall not have been paid prior to the death of the payee, shall, unless otherwise directed in said written election, be computed at three and one-half per centum per annum, compound interest, and paid in one sum to the executors or administrators of the payee.

In lieu of semi-annual Instalments under Option 2, quarterly or monthly payments thereof, and in lieu of annual instalments under Option 3, semi-annual, quarterly or monthly payments thereof, in each case for proportionate parts, may be elected.

The amounts payable under the foregoing Options are based upon an assumed interest earning of three and one-half per centum per annum, but if in any year the Company shall declare for that year, upon funds held by it under such Options, a greater interest rate than three and one-half per cent., the amount payable on the next anniversary of such payments under Options 1 or 2, or under Option 3, within the fixed period of ten or twenty

years as the case may be, shall be increased accordingly.

When so directed in the said written election, but not otherwise, the supplementary contract hereinafter provided for, on legal release thereof, may be surrendered for the amount so retained by the Company, with any accrued interest under Option 1, or for the commuted value of any stipulated Instalments yet to be paid under Option 2, or for the commuted value of any unpaid Instalments for the fixed period of ten or twenty years, as the case may be, then remaining unpaid under Option 3., such commutation under Option 3 shall, however, in nowise operate as to payments conditional upon the payee surviving the term during which the instalments certain would have been payable. Such commuted value under either Option 2 or 3 shall be the amount calculated by the Company on the basis of compound interest at the rate of three and one-half per centum per annum. A payee [17] who has not, by virtue of the terms of said written election, the right to surrender the supplementary contract may not assign or encumber such contract or any payment thereunder.

Election of any of the foregoing Options must be made in writing, addressed to the Company at its Home Office, and may be made (a) prior to the death of the Insured, by the Insured and the Beneficiary jointly, or, if the right to change the beneficiary has been reserved, then by the Insured alone; or, (b) if there be no such election on file

with the Company at the time of the death of the Insured, then such election may be made by the beneficiary. In no event, however, will any of the foregoing modes of settlement be available if the Policy is assigned and any assignment will nullify any prior election.

No election shall be effective which shall purport to require any Interest or Instalment payment to be made by the Company in a sum less than $10.

Optional settlements may not be elected under a Policy which is payable to a corporation, co-partnership or association.

In case one of the foregoing optional modes of settlement is selected, this Policy must be surrendered, whereupon a supplementary contract will be issued by the Company for the Option elected.

808AOrd. -4-26

COPY OF APPLICATION ATTACHED HERETO.

NOTICE TO POLICY-HOLDER

PLEASE READ YOUR POLICY PROMPTLY UPON ITS RECEIPT.

Do not fail to notify the Company at its Home Office when you change your address.

When writing District Office or the Home Office give your Policy Number and state clearly Name, Residence, County and State.

The Company Agents have no authority to waive forfeitures, to [18] alter or amend this Policy, to accept premiums in arrears or to extend the due date of any premium.

Checks, drafts, or Money Orders in payment of premiums should be drawn to the order of Metropolitan Life Insurance Company.

Privilege of voting for Directors. The election of Directors of the Company is to be held in New York on the second Tuesday in April, 1927, and every second year thereafter. The holder of this Policy, after one year from its date, while it remains in force, will have a right to vote either in person or by proxy or by mail. For particulars as to how to vote, apply to the Secretary, No. 1 Madison Avenue, New York City.

In the Event of the death of the Insured, the Claimant should promptly advise the Home Office, in New York, or the District Office through which premiums payments have been made.

Pay nothing to any representative of the Company for preparation of claim papers. Deliver the Policy only to the Company's representative. The Company is glad to pay and there is no necessity for help or alleged influence in collecting. It is not necessary to employ an attorney or any other person to collect the insurance under this Policy, or to secure any of the benefits it provides.

Premium Payments are invalid unless made in exchange for an official Home Office receipt signed by the President, Vice-President, Actuary, Treasurer of the Company and properly countersigned.

District Chico Number 1253695 A

The Light That Never Fails

Metropolitan Life Insurance Company, 1 Madison Avenue, New York, a Mutual Life Insurance

Company. Incorporated by the State of New York, N. Y. Limited Payment Life Policy Insuring the Life of George R. Halcomb in the amount of $2000 for ¼ Annual Premium of $13.02 payable for 20 years from APR 13 1928 the date of issue, or until prior death. Annual Distribution of Divisible Surplus. Premiums for Supplementary [19] Contract, Disability $1.38 ¼ ANN.

Accidental Death Provision $ .80 ¼ ANN.

Receipt of $15.20, the first premium hereunder, is hereby acknowledged.

Countersigned

May 16, 1928 JAS. S. ROBERTS, Secretary.

Signature EMANUEL J. YAGER Agt.

This Policy shall not take effect unless or until the first premium therefor, as entered on the foregoing receipt, has actually been paid in cash.

808-AOrd. -4-26

Printed in U. S. A.

This Policy has been assigned to the Metropolitan Life Insurance Company as the sole security for a Loan, the unpaid amount of which and of the interest thereon is a lien against the policy. Possession of the policy, as evidence of such security, has been waived by the Company. Nov. 27, 1931.

In compliance with the written request of the insured it is hereby declared that the amount due at the death of the said Insured shall be payable to Mae S. Halcomb Wife of the Insured, if living, otherwise to the Estate of the Insured, with right of revocation.

4/24/31 W. C. ALTCHER

DT Secretary

ACCIDENTAL DEATH BENEFIT.

Benefit payable in the event of death from accident as herein limited and provided.

Supplementary Contract attached to and made part of Life Insurance Policy No. 1253695 issued on the life of George [20] R Halcomb Metropolitan Life Insurance Company in consideration of the application for this Contract, as contained in the application for said Policy, the latter being the basis for the issuance hereof, and in consideration of —— dollars and Eighty cents, payable ¼ Annual as an additional premium herefor, such payment being simultaneous with, and under the same conditions, as, the regular premium under the said policy except as hereinafter provided.

Hereby agrees to pay to the Beneficiary or Beneficiaries of record under said policy, in addition to the amount payable according to the terms of said policy, the sum of Two Thousand dollars, upon receipt, at the Home Office of the Company in the City of New York, of due proof of the death of the insured, as the result, directly and independently of all other causes, of bodily injuries sustained through external, violent and accidental means, provided (1) that such death shall have occurred while said policy and this Supplementary Contract are in full force, and prior to the anniversary date of said policy nearest to the sixty-fifth birthday of the insured: and (2) that all premiums under said policy and this Supplementary Contract shall have been duly paid; and (3) that said policy shall not then be in force by virtue of any non-forfeiture provisions thereof; and (4) that death shall have en-

sued within ninety days from the date of such injuries; and (5) that death shall not have been the result of self-destruction, whether sane or insane, or caused by or contributed to, directly or indirectly, or wholly, or partially, by disease or by bodily or mental infirmity; and (6) that death shall not have resulted from bodily injuries sustained while participating in aviation or aeronautics except as a fare paying passenger, nor while the insured is in the Military or Naval Service in time of war, nor as the result of violation of law by the insured. [21]

If premiums continue to be payable under the terms of said policy after the anniversary of said policy nearest to the sixty-fifth birthday of the insured, this Supplementary Contract shall, nevertheless, terminate and be of no further force or effect and the additional premium on account hereof shall cease to be payable, both on the anniversary of said policy nearest to the sixty-fifth birthday of the insured.

The Company shall have the right and opportunity to examine the body of the insured, and to make an autopsy in case of claim hereunder, unless forbidden by law.

If said policy or any Supplementary Contract attached and made a part thereof, contains a provision for the waiver of premiums in the event of the total and permanent disability of the insured, further premiums under this Supplementary Contract shall be waived if and when premiums under said policy are waived as a result of such disability.

The insurance under this Supplementary Con-

tract shall be suspended while the insured is in the Military or Naval Service in time of war, in which event that portion of the additional premium unearned during the period of such suspense shall be refunded.

This Supplementary Contract may be canceled by the insured on the due date of any premium or instalment thereof, by written request to the Company, together with the return of the policy, and this Supplementary Contract to the Company, and the endorsement of such cancellation hereon.

This Supplementary Contract shall automatically terminate and be of no further force or effect if any premium on said policy or on this Supplementary Contract shall remain unpaid at the end of the period of grace allowed under said policy for payment of premium thereunder or if said policy be surrendered or converted under one of its nonforfeiture provisions or otherwise terminated. [22]

Whenever this Supplementary Contract shall be canceled or otherwise terminated, the additional premium shall no longer be payable.

This Supplementary Contract shall be deemed to be a part of the above numbered policy and the provision of said policy concerning declarations and representations by the insured, restrictions, payment of premiums, change of beneficiary, and assignment, are hereby referred to and by such reference made a part hereof. No other provision of said policy shall be held or deemed to be a part hereof, except

(a) The provision of the said policy as to incontestability shall apply hereto, but shall not pre-

clude the Company from requiring as a condition to recovery hereunder, due proof that death occurred through accidental means, within the terms of this Supplementary Contract.

(b) The provision of said policy as to reinstatement shall apply hereto, except that this Supplemental Contract shall not be reinstated unless said policy is in force and no premium is in default thereon, or unless said policy is reinstated at the time of reinstatement of this Supplementary Contract.

(c) The provisions of said policy as to payment in instalments or as to Optional Settlements shall be so applied that if and when the proceeds of said policy shall be so payable in instalments, whether under an election duly made by the Insured or the beneficiary, or otherwise, then any amount payable under this Supplementary Contract shall be payable in like manner and in the same instalments per one thousand dollars of insurance or commuted value as the instalments under said policy.

No change in, addition to, waiver or permit under this Supplementary Contract shall be valid unless endorsed hereon and signed by an executive officer of the Company. [23]

In Witness Whereof, the Metropolitan Life Insurance Company has caused this Supplementary Contract to be executed this 13th day of April 1928.

JAS. S. ROBERT — Secretary

HARRY FISKE — President

Form B689 Ord
Nov. 1922
5-2.18.28-15c

Total and Permanent Disability.

WAIVER OF PREMIUMS AND PAYMENT OF MONTHLY INCOME.

Supplementary Contract attached to and made part of Life Insurance Policy No. 1253695 issued on the life of George R Halcomb Metropolitan Life Insurance Company in consideration of the application for this Contract, as contained in the application for said Policy, the latter being the basis for the issuance hereof, and in consideration of One Dollars and Thirty-eight cents payable ¼ Annual as an additional premium herefor, such payment being simultaneous with, and under the same conditions as, the regular premium under the said Policy, except as hereinafter provided,

Hereby Agrees, that upon receipt by the Company at its Home Office in the City of New York of due proof, on forms which will be furnished by the Company, on request, that the insured has, while said Policy and this Supplementary Contract are in full force and prior to the anniversary date of said Policy nearest to the sixtieth birthday of the insured, become totally and permanently disabled, as the result of bodily injury or disease occurring and originating after the issuance of said Policy, so as to be prevented thereby from engaging in any occupation and performing any [24] work for compensation or profit, and that such disability has already continued uninterruptedly for a period of at least three months, it will, during the continuance of such disability,

1. Waive the payment of each premium falling due under said Policy and this Supplementary Contract, and

2. Pay to the Insured, or a person designated by him for the purpose, or if such disability is due to, is accompanied by, mental incapacity, to the beneficiary of record under said Policy, a monthly income of $10 for each $1,000 of insurance, or of commuted value of installments, if any, under said Policy.

Such waiver shall begin as of the anniversary of said Policy next succeeding the date of the commencement of such disability, and such payments shall begin as of the date of the commencement of such disability, provided, however, that in no case shall such waiver begin as of any such anniversary occurring, nor shall such payments begin as of a date, more than six months prior to the date of receipt of the required proof.

The disability benefit herein provided shall not be payable if, at the date of disability, the said Policy shall be in force by virtue of any nonforfeiture provisions thereof, or if disability shall have resulted from bodily injuries sustained by the insured while participating in aviation or aeronautics, except as a farepaying passenger, or sustained while the Insured is in the Military or Naval Service in time of war, or as the result of violation of law by the insured.

Notwithstanding that proof of disability may have been accepted by the Company as satisfactory,

the insured shall at any time, on demand from the Company, furnish due proof of the continuance of such disability, but after such disability shall have continued for two full years the Company will not demand such proof more often than once in each subsequent year. If the insured shall fail to furnish such proof, or if the insured shall be able [25] to perform any work or engage in any business whatsoever for compensation or profit, the monthly income herein provided shall immediately cease, and all premiums thereafter falling due shall be payable according to the terms of said Policy and of this Supplementary Contract.

The waiver of premiums and monthly income payments herein provided shall be in addition to all other benefits under said Policy, provided, however, that, if there be indebtedness to the Company under said Policy, the interest on such indebtedness shall, if not otherwise paid, be deducted from said monthly income payments. Monthly income payments shall not be subject commutation.

If premiums continue to be payable under the terms of said Policy after the anniversary of said Policy nearest to the sixtieth birthday of the insured, this Supplementary Contract shall, nevertheless, terminate and be of no further force or effect and the additional premium on account hereof shall cease to be payable both on the anniversary of said Policy nearest to the sixtieth birthday of the insured.

The insurance under this Supplementary Contract shall be suspended while the Insured is in the Military or Naval Service in time of war, in which event that portion of the additional premium unearned during the period of such suspense shall be refunded.

This Supplementary Contract may be canceled by the insured on the due date of any premium or installment thereof, by written request to the Company, together with the return of said Policy and this Supplementary Contract, to the Company, and the endorsement of such cancellation hereon.

This Supplementary Contract shall automatically terminate and be of no further force or effect, if any premium on said Policy, or on this Supplementary Contract, shall remain unpaid at the end of the period of grace allowed under said Policy for [26] payment of premium thereunder or if said Policy be surrendered or converted under one of its non-forfeiture provisions or otherwise terminated.

Whenever this Supplementary Contract shall be canceled or otherwise terminated, the additional premium shall no longer be payable.

This Supplementary Contract shall be deemed to be a part of the above numbered Policy and the provisions of said Policy concerning declarations and representations by the insured, restrictions, payment of premiums, change of beneficiary, and assignment, are hereby referred to and by such reference made a part hereof. No other provisions of

said Policy shall be held or deemed to be a part hereof, except

(a) The provision of the said Policy as to incontestability shall apply hereto, but shall not preclude the Company from requiring, as a condition to recovery hereunder, due proof of such total and permanent disability as entitled him to the benefits hereof.

(b) The provision of said Policy as to reinstatement shall apply hereto, except that this Supplementary Contract shall not be reinstated unless said Policy is in force and no premium is in default thereon, or unless said Policy is reinstated at the time of reinstatement of this Supplementary Contract.

No change in, addition to, waiver or permit, under this Supplementary Contract shall be valid unless endorsed hereon and signed by an executive officer of the Company.

In Witness Whereof, the Metropolitan Life Insurance Company has caused this Supplementary Contract to be executed this 13th day of April 1928

JAS. S. ROBERT — Secretary

HARRY FISKE — President

Form B 688 Ord.
Nov. 1922
6-11.1.27-Im [27]

Apr 13 28

Part A

Use Black Ink for Answers and Signatures

Application to the Metropolitan Life Insurance Company (Incorporated by the State of New York) This form to be used for ages 16 and over for ordinary or intermediate applications not over $2000.

1. Full name of person whose life is to be insured. (Print) GEORGE RAYMOND HALCOMB
2. Residence. If in country state R. F. D. Route.
   Apr. No.....
   Floor.....
   No. 3 Street (Print) FIRST Front or rear
   City or Town (print) REDDING
   County SHASTA State CAL
   How long have you resided at this address? WHOLE LIFE
   If less than one year give previous address
   To what address shall communications be sent? Residence
3. Place of birth Town or City State
   REDDING CAL
4. Date of birth Age nearest birthday
   Month SEPT. Day 6 Year 1907 21 years.
   (Be sure age and date of birth are in accord)
5. Single, married, Widower, or widow? Divorced or Separated? SINGLE
6. Occupation. If more than one, state all. Nature of employer's business. CLERK

7. Exact duties of Occupation.
   CHECKING IN BANK
8. Any change in occupation contemplated? If so, give particulars NO
9. Place of business (City, Street and No.) By whom employed.
   MARKET STREET NORTHERN CAL.
   REDDING, CAL. NAT. BANK.
10. Former occupation (within last ten years)
    SCHOOL AND SAME AS 6 [28]
11. Do you within the next twelve months, contemplate journeying outside the United States or Canada, or making an ocean trip? If yes, state when, where to, for what purpose and for how long?
    NO
12. Have you any intention of making aerial flights within the next two years? If yes, give particulars.
    NO
13. Have you any other application or negotiation for life, accident or health insurance now pending or contemplated? If yes, give particulars.
    NO

Form 036N.M-1
Ordinary Dept. Pd. Sept. 1926
1253695 Printed in U. S. A.

14. Amount of Insurance desired $2000 Ordinary Prem. Payable $ Intermediate
    Annually, Semi-An., Quarterly ~~Monthly~~

15. Plan of Insurance as
designated in Rate Book
20 P. L. With Disability 8 P. L.

16. (a) Beneficiary in case of your death (print)
IDA JOSEPHINE HALCOMB
Relationship of proposed beneficiary MOTHER
Occupation Housewife
P. O. Address 3 FIRST ST. REDDING, Cal.
Do you reserve the right to change the beneficiary at any time without the consent of Beneficiary herein designated?
YES
Answer Yes or No

17. Is any one entirely dependent upon you for Support? If yes give particulars.
NO

18. Are you insured in this or any other Company? If Yes, give particulars.
Name of Company
Amount
Kind of Policy Your Insured
If in Metropolitan give Policy No. [29]
What amount of the above insurance carries,
(a) Disability Provision? $ NONE
(b) Accidental Death benefit (Double indemnity)

19. If now applying for disability provision, state amount of weekly benefit carried under Health Policies issued by this or any other Company
$ NONE

20. Is the Policy for which you are hereby applying intended to take the place of insurance carrier with this or any other Company? If Yes, give particulars.
    NO
21. What amount have you paid in advance on account of the first premium? $5.00
22. Corrections and Amendments. (For Home Office use)
23. Have you ever applied to any Company or Association without receiving Insurance in the Amount or on the plan applied for, or at your actual age, or at the normal premium therefor? If Yes, give particulars. NO

Company or Association Year — If not issued as applied for in what respect different? Declined or postponed. If not advised, so state.

To be completed in the case of a woman applicant, if ever married.

24. What are (in full) the sources of your income?
25. Number of children living, age and occupation of each.
26. Husband's name — Age
    (a) Business
    (b) In what companies and for what amount
    Is he insured in your favor?

(c) If not insured in your favor, state why not.

(d) Is application on his life being submitted?

It is understood and agreed: 1. That the foregoing statements and answers are correct and wholly true, and, together with the answers to questions on Part B hereof, they shall form the basis of the contract of Insurance, if one be issued.

2. That no agent, medical examiner or any other person, except the officers of the Company, have power on behalf of the Company:
   (a) To make, modify or discharge any contract of Insurance,
   (b) To bind the Company by making any promises respecting any benefits under any policy issued hereunder.
3. That no statement made to or by, and no knowledge on the part of, any agent, medical examiner or any other persons as to any facts pertaining to the Applicant shall be considered as having been made or brought to the knowledge of the Company [30] unless stated in either part A or B of this Application.
4. That the Company shall incur no liability under this application until it has been received, approved and a policy issued and delivered and a full first premium stipulated in the policy has actually been paid to and accepted by the Company during the lifetime of the applicant, in which case such Policy shall be deemed to have

taken effect as of the date of issue as recited on the first page thereof.

5. In case of apparent errors or omissions discovered by the Company in Part A of this Application, the Company is hereby authorized to amend this Application by noting the change in the space entitled "Corrections and Amendments", and I hereby agree that my acceptance of such Policy, accompanied by a copy of the application so amended, shall operate as a ratification of such changes or amendments, provided, however, that no change shall be made as to amount, classification, plan of insurance or benefits unless agreed to in writing by me.

Signed by Applicant and dated at Redding this 11 day of April, 1928.

Witness to Signature E. YAGER Agt.

Signature of Applicant GEORGE RAYMOND HALCOMB

CONTINUATION OF THE APPLICATION.

Part B

Use Black Ink for Answers and Signature

The spaces below are for the Applicant's Answers only. Nothing but his Answer should be inserted. Every Question in Part B must be fully answered by the Applicant in the presence of the Agent, or the Medical Examiner, if medical examination is required.

you within the last twelve months to *any Insurance* Company for Insurance without *medical tion?* If Yes, give names of Companies

and amount *of c* issued. If declined, or postponed, so state.

NO [31]

2. What is your height? 5 ft 9½ in.
3. (a) What is your weight? 137 pounds.
   (b) Date when last weighed 6 days ago
4. Change in weight in last two years.
   (a) Decrease No
   Increase No
   (b) If not stationary, give cause and particulars.
5. What are your measurements (under vest?)
   Chest 31½ inches
   Waist 31 inches
6. Present condition of health? Good
7. (a) When last sick? May, 1926
   (b) Nature of sickness. Operated for appendicitis
   (c) How long sick? Two weeks.
8. Have you ever changed your residence or left your work for more than one month on account of your health? No
   If Yes, give date, duration and name of ailment.
9. Any mental or physical defect or infirmity? If yes, give particulars. No.
10. Any impairment of sight or hearing? If yes, give particulars. No.
11. Have you had any surgical operation, serious illness or accident? If yes, give date, duration and name of ailment. Yes, See No. 7 b
12. Are you ruptured? If yes, give particulars, and state whether you wear a truss. No.

13. Have you ever been told that there was sugar, albumin or casts in your urine? No
14. Have you ever taken Insulin treatment? If yes, state dates and for how long. No.
15. Have you ever been told that you had any heart trouble? No.
16. Name and address of your usual medical attendant? Dr. C. A. Muller, Redding, Cal.
17. Have you ever had any of the following complaints or diseases? Apoplexy, appendicitis, Asthma, Bronchitis, Cancer or other Tumor, Consumption, Diabetes, Disease of Heart, Disease of Kidneys, Disease of Liver, Disease of Lungs, Fistula, Fits or Convulsions, Goitre, Habitual cough, Insanity, Colic, Jaundice, Paralysis, Pleurisy, Pneumonia, Rheumatism, Scrofula, Syphilis, Spinal Diseases, Spitting of Blood, Varicose Veins. If yes, give particulars, dates and duration See No. 7 b [32]
18. Have you been attended by a physician during the last five years? If yes, give name of complaints, dates, how long sick, and names of physicians.
    Operated for appendicitis. Sherman T. White
19. Have you had any treatment within the last five years at any dispensary, hospital or sanatorium? If yes, give date, duration, name of ailment and name of institution.
    Yes. See No. 7 b and No. 18.
20. How much time have you lost from work through illness during the last five years?
    2 weeks

21. Have you ever used opium, chloral, cocaine, or other narcotics? No.

22. (a) To what extent do you use beer, wine or other alcoholic beverages? None

(b) Have you ever used any of them to excess? If yes, when, and for how long? No

23. Are you now, or have you ever been, engaged in the manufacture or sale of malt or alcoholic liquors? No

24. Have you during the past year resided or been intimately associated with any person suffering from consumption? If yes, give particulars. No.

25. Has any one of your parents, brothers or sisters now, or ever had, tuberculosis, cancer, diabetes, epilepsy, insanity, or any hereditary disease? If yes, give particulars. No

26.

	Living		Dead		
Family Record	Age	Health	Age at Death	Year of Death	Cause of Death
Father	53	good			
Mother	50	good			
Brothers	14	good			
	12	good			
No. living	5 9	good			
No. Dead	1 5	good	1 day		
Sisters	21	good			
	17	good			
No. living	4 7			dont	dont
No. dead	1 3		1 year	know	know

I hereby certify that I have read the Answers to the questions [33] in Part A hereof, and to the

questions in Part B hereof, before signing and that they have been correctly written, as given by me, and that they are full, true and complete, and that there are no exceptions to any such answers other than as stated herein.

Dated at Redding this 12 day of April, 1928

Witness to signature J. E. TAYLOR

Signature of Applicant

GEORGE RAYMOND HALCOMB

[Endorsed]: Filed Sept 12 1932 Errol A. Yank, Clerk, By L. Elizabeth Bass, Deputy Clerk. [34]

[Title of Court and Cause.]

THE PEOPLE OF THE STATE OF CALIFORNIA send greeting to METROPOLITAN LIFE INSURANCE COMPANY, a Corporation, Defendant

You are hereby required to appear in an action brought against you by the above-named Plaintiff, in the Superior Court of the County of Shasta, State of California, and to answer the Complaint filed therein, within ten days, (exclusive of the day of service) after the service on you of this Summons, if served within said County; if served elsewhere, within thirty days.

And you are hereby notified that if you fail to appear and answer, the Plaintiff will take judgment for any money or damages demanded in the Complaint as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Witness my hand and the seal of said Superior Court of the County of Shasta, State of California, this 12th day of September, A. D., 1932.

ERROL A. YANK

Clerk,

[Superior Court Seal] By RUTH A. PRESLEIGH

Deputy Clerk.

[35]

State of California
County of San Francisco.—ss.

Harold Friedenberg, being first duly sworn, says: That at all of the times herein mentioned, he was over the age of eighteen years, and not a party to the within action. That on the 14th day of September 1932 in the County of San Francisco, he served the within Summons upon the Defendant Metropolitan Life Insurance Co., a Corporation by then and there delivering to E. G. Galt, Asst. Secretary for Metropolitan Life Insurance Co., personally a copy of said Summons attached to a copy of the Complaint in said action. That on the 14th day of September, 1932, he served said Summons upon the Defendant Metropolitan Life Insurance Co., in the County of San Francisco by then and there delivering to E. G. Galt who is Asst. Secretary for Metropolitan Life Insurance Company, the said Defendant, a copy of said Summons, attached to a copy of the Complaint in said action.

[Seal] HAROLD FRIEDENBERG

Subscribed and sworn to before me this 14th day of Sept. 1932.

ORAH M. NICHOLS

My Commission expires April 4th, 1935.

[Endorsed]: Filed Sept. 20, 1932. Errol A. Yank, Clerk, by Ruth A. Presleigh, Deputy Clerk. [36]

[Title of Court and Cause.]

PETITION FOR REMOVAL.

The petition of the Metropolitan Life Insurance Company, a corporation, defendant herein, respectfully shows:

I.

That the amount and matter in dispute in the above-entitled action exceed the sum of $3,000.00, exclusive of interest and costs, towit, the sum of $4,000.00.

II.

The controversy in said action is, and at the time of the commencement thereof was, between citizens and residents of different states, to-wit, between a citizen and resident of the State of California, and a citizen and resident of the State of New York, as follows: That plaintiff is a citizen and resident of the State of California, and of the Northern Division, in the Northern District thereof; that defendant, Metropolitan Life Insurance Company, is now, and at all times herein mentioned was, a corporation organized and existing under

and by virtue of the laws of the State of New York, and a citizen of said State.

III.

Petitioner herewith offers a bond with good and sufficient surety, to-wit, Glens Falls Indemnity Company, in the sum of $500.00, for entry in the office of the Clerk for the Northern Division, Northern District of California, within thirty days, of a certified copy of the record in the above-entitled action, and for the payment of any costs that may be awarded by said court if said court shall hold that said suit was wrongfully or improperly removed thereto. [37]

IV.

The time within which defendant is required to plead or answer to the complaint herein, under and by virtue of the laws of the State of California, and the rules of this court, has not expired.

WHEREFORE, petitioner prays that this Honorable Court proceed no further herein, except to make the order for removal required by law, and to accept the said surety and bond, and cause the record herein to be removed unto the District Court of the United States, for the Northern District of California, Northern Division.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
By L. J. SCHMOLL
Assistant Secretary

KNIGHT, BOLAND & RIORDAN,
Attorneys for Petitioner. [38]

State of California
City and County of San Francisco.—ss.

L. J. Schmoll, being first duly sworn, deposes and says:

That he is an officer of the Metropolitan Life Insurance Company, a corporation, to-wit, an Assistant Secretary of the defendant corporation in the within action, and that he makes this verification for and on behalf of said corporation.

That he has read the foregoing petition for removal and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated therein on information or belief, and as to such matters that he believes it to be true.

[Seal] L. J. SCHMOLL

Subscribed and sworn to before me this 19th day of September, 1932.

MARION CURTIS
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sept. 29, 1932. Errol A. Yank, Clerk. [39]

GLENS FALLS INDEMNITY COMPANY of Glens Falls, New York

[Title of Court and Cause.]

BOND ON REMOVAL FROM SAID COURT.

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, Glens Falls Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of New York for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by law, and having complied with all the requirements of the laws of the State of California regulating the admission of such a corporation to transact business in said State, is held and firmly bound unto the plaintiff in the above entitled action as administrator, and to his successors, heirs, representatives and assigns, in the sum of Five Hundred and no/100 Dollars ($500.00), lawful money of the United States of America, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

The condition of this obligation is such that, whereas, the defendant, Metropolitan Life Insurance Company, a Corporation, has applied, by petition to the Superior Court of the State of California, in and for the County of Shasta, for the removal of a certain cause therein pending, wherein Amos Halcomb, administrator of the estate of George R. Halcomb, deceased, is plaintiff, and the

said Metropolitan Life Insurance Company is defendant, to the Federal Court, Northern District of California, Northern Division, for further proceedings, on the grounds in said petition set forth, and that all proceedings in said action in said Superior Court be stayed; [40]

Now, therefore, if your petitioner, the said Metropolitan Life Insurance Company shall enter in said Federal Court, Northern District of California, Northern Division, within thirty days from the date of the filing of said petition in said Superior Court, a certified copy of the record in said suit and shall pay all costs which may be awarded by said Federal Court if said Federal Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, the undersigned corporation has caused these presents to be executed by its Attorney and its corporate seal to be hereto affixed, this 20th day of September, 1932.

GLENS FALLS INDEMNITY COMPANY,
By R. LYNN COLOMB
Attorney.

State of California,
City and County of San Francisco.—ss.

On this 20th day of September, in the year One Thousand Nine Hundred and thirty-two before me, Con T. Shea, a Notary Public, in and for the said City and County of San Francisco, personally ap-

peared R. Lynn Colomb known to me to be the Attorney of the Glens Falls Indemnity Company, the Corporation described in and that executed the within instrument, and also known to be to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and [41] affixed my Official Seal, at my office in the City and County of San Francisco, State of California, the day and year in this Certificate first above written.

[Seal] CON T. SHEA

Notary Public in and for the City and County of San Francisco, State of California.

Approved, Oct. 3, 1932

WALTER E. HERZINGER,

Judge.

[Endorsed]: Filed Sept. 30, 1932. Errol A. Yank, Clerk, By Ruth A. Presleigh, Deputy. [42]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REMOVAL WITH COPY OF PETITION AND BOND ATTACHED.

To the Plaintiff above-named and to L. C. Smith, Esq., his attorney:

You are hereby notified that the defendant herein, Metropolitan Life Insurance Company, a corporation, has prepared and intends to file herein its

petition and bond for the removal of the above-entitled cause from the above-entitled court and into the District Court of the United States, for the Northern District of California, northern Division; that copies of said petition and bond are attached hereto and made a part hereof; that said petitioner will, on Friday, the 30th day of September, 1932, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, present said petition and bond to the above-enttiled court, located at the Courthouse of the above-entitled court in the City of Redding, County of Shasta, State of California, and will then and there apply to said court for an order removing said cause as in said petition prayed.

Dated September 20th, 1932.

KNIGHT, BOLAND & RIORDAN

Attorneys for Defendant, Metropolitan Life Insurance Company, a corporation.

[Endorsed]: Filed Sept. 29, 1932. Errol A. Yank, Clerk. [43]

[Title of Court and Cause.]

Receipt of copies of the within Petition for Removal, Bond upon Removal, and Notice of Time and Place for Presentation of Petition for Re-

moval in the above entitled case is hereby admitted this 24th day of September, 1932.

L. C. SMITH

Attorney for Plaintiff.

[Endorsed]: Filed Sept. 29, 1932. Errol A. Yank, Clerk. [44]

[Title of Court and Cause.]

October 3, 1932.

Present: Hon. Walter E. Herzinger, Judge.

PETITION FOR REMOVAL TO FEDERAL COURT IS GRANTED.

I, Errol A. Yank, Clerk of the Superior Court, in and for the County of Shasta, do hereby certify that the foregoing is a full, true and correct copy of an order made in the above entitled action and entered on the minutes of said Superior Court, on the 3rd day of October, 1932.

Attest, My hand and seal of said Superior Court this 3rd day of October, 1932.

ERROL A. YANK,

Clerk.

Order for Removal signed and filed October 3, 1932. [45]

[Title of Court and Cause.]

ORDER FOR REMOVAL.

Defendant above named, Metropolitan Life Insurance Company, a corporation, having filed herein its petition for removal in the above entitled cause

to the Northern Division of the United States District Court for the Northern District of California, and having filed therewith a good and sufficient bond conditioned as required by law, and having given due notice of the time and place for the presentation of said petition and bond; now, therefore,

It is hereby ordered that the above entitled cause be transferred to the Northern Division of the United States District Court for the Northern District of California for further proceedings.

And it is further ordered that the bond and undertaking on removal tendered herewith be and the same is hereby approved.

Dated: October 3rd, 1932.

WALTER E. HERZINGER
Judge of the Superior Court of the State of California, in and for the County of Shasta.

[Endorsed]: Filed Oct. 11, 1932. Errol A. Yank, Clerk, By Ruth A. Presleigh, Deputy Clerk. [46]

I, Errol A. Yank, County Clerk of the County of Shasta, and ex-officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full and correct copy of the Complaint, summons, petition for removal; bond on removal from said Court; Notice of filing petition for removal with copy of petition and bond attached; receipt of copies, etc.; copy of minute order granting removal

and order for removal, in the matter of Amos Halcomb, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased, plaintiff, vs. Metropolitan Life Insurance Company, a corporation, defendant, now on file and of record in my office.

Witness my hand and seal of said Court, this 11th day of October, 1932.

[Seal] ERROL A. YANK, Clerk.

[Endorsed]: Filed Oct. 14, 1932. Walter B. Maling, Clerk. [47]

[Title of Court and Cause.]

NOTICE OF FILING RECORD ON REMOVAL.

To plaintiff above named and to L. C. Smith, Esq., his attorney:

YOU AND EACH OF YOU are hereby notified that defendant on the 14th day of October, 1932, filed a certified transcript of the record in the above entitled case with the Clerk of the United States District Court for the Northern District of California, Northern Division; that said record when filed in said court was numbered 1038 S.

Dated: October 15, 1932.

KNIGHT, BOLAND & RIORDAN

Attorneys for Defendant.

[Endorsed]: Filed Oct. 18, 1932. Walter B. Maling, Clerk. [48]

[Title of Court and Cause.]

AMENDED ANSWER.

Comes now the defendant and files this its amended answer to the complaint of plaintiff on file herein, and admits, denies and alleges as follows:

I.

Admits the allegations of section "I".

II.

Admits the allegations of section "II".

III.

Admits the allegations of section "III".

IV.

Denies all the allegations of section "IV" except as herein specially alleged. Alleges that on or about the 13th day of April, 1928, in consideration of a written application therefor and the payment of $13.02, and the payment of a like sum on the 13th day of July, October, January and April in each year until twenty full years' premiums shall have been paid, defendant issued to George R. Halcomb its policy of insurance upon his life, wherein and whereby defendant promised to pay to Ida J. Halcomb, mother of the insured, the sum of $2,000.00, upon receipt of due proof of the death of said George R. Halcomb. In further consideration of said application, and the payment of eighty cents on the 13th day of July, October, January and April in each year, defendant agreed to pay to said

Ida J. Halcomb the further sum of $2,000.00 upon receipt at the home office of defendant of due proof of the death of said George R. Halcomb as the result, directly and independently of all other causes, of bodily injuries sustained through external, violent and accidental means, provided that such death shall not have resulted from bodily injuries sustained while participating in aviation or [49] aeronautics except as a fare-paying passenger. That thereafter, and under the terms of said policy, Sadie Mae Halcomb, wife of George R. Halcomb, was substituted as beneficiary thereof. That a copy of said policy is attached to and made a part of the complaint herein.

V.

Admits the allegations of section "V".

VI.

According to the information and belief of defendant, defendant denies that Sadie Mae Halcomb predeceased George R. Halcomb, and upon like information and belief alleges that George R. Halcomb and Sadie Mae Halcomb perished in a common disaster, to-wit, in an airplane accident. Denies that at the time of their deaths, respectively, either George R. Halcomb or Sadie Mae Halcomb were, either of them, fare-paying passengers in said or any airplane, and in this connection alleges, upon information and belief, that they met their deaths, respectively, as aforesaid while participating in aviation or aeronautics, to-wit, by airplane accident, neither being a fare-paying passenger.

VII.

Admits that the policy was in full force and effect, as hereinbefore alleged, at the time of the death of George R. Halcomb, but denies that plaintiff made proof of death in accordance with the terms and/or conditions of said policy in this, that he did not furnish proof of death that George R. Halcomb died as the result, directly and independently of all other causes, of bodily injuries sustained through external, violent and accidental means while participating in aviation or aeronautics as a fare-paying passenger.

VIII.

Admits that defendant has failed and neglected and refused, and now fails and neglects and refuses, to pay plaintiff [50] the sum of $4000.00, and the defendant denies the rest and remainder of the allegations set forth in Paragraph VIII of said complaint, and each thereof, and in this regard avers that upon the date of the death of the said insured there was due payable to the plaintiff from the defendant, under the terms and provisions of said policy only, the sum of $2,000.00, together with accrued dividends on said policy in the sum of $8.29, less, however, the sum of $78.00, with interest in the sum of $1.09, or the total sum of $79.09, which said sum was and now is the principal and interest due, owing and unpaid by the insured to the defendant pursuant to the said policy of insurance and to the terms of a certain Loan Certificate and Assignment of said policy, dated No-

vember 28, 1930, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof to the same extent as though the same was fully set forth herein. That there is now due, owing and payable to plaintiff from defendant under and pursuant to the terms and provisions of said policy of insurance the sum of $1,929.20, and no more. That on or about the 6th day of September, 1932, defendant offered to pay and tendered to plaintiff the said sum of $1,929.20 in full payment of its entire obligation and liability under said policy, and that plaintiff refused to accept said offer or tender, and that defendant now offers to pay the plaintiff the said sum of $1,929.20, and no more.

Wherefore, defendant prays that plaintiff have judgment for $1,929.20, and no more, and that otherwise it be hence dismissed with its costs.

Dated, September 29th, 1933.

DEVLIN & DEVLIN
& DIEPENBROCK
Attorneys for Defendant. [51]

EXHIBIT "A".

Full Loan Value

FOR HOME OFFICE USE

Policy Number—1253695 a
Date of Loan—Nov. 28, 1930
Amount of Loan—$78.00

LOAN CERTIFICATE
and Assignment of Policy

Policy No.—1253695 a
Insured—George R. Halcomb

The Undersigned George R. Halcomb hereby assign(s), transfer(s) and set(s) over unto the Metropolitan Life Insurance Company all right, title and interest in its policy above designated, together with all money that may become payable thereunder, as sole security for a loan in the sum of Seventy Eight and No/100 Dollars, receipt of which is hereby acknowledged.

Said loan shall bear interest from the date the loan is granted at the rate provided in said policy, payable annually on the anniversary date of the policy and, unless duly paid, said interest shall be added to the principal of the loan and bear interest at the same rate and on the same conditions. Payments of interest and payments on account of principal, may be made at the Home Office of the Company, 1 Madison Avenue, New York City, or at such other offices as may be designated by the Company; but only in exchange for the Company's official receipt, signed by the Secretary, and counter-

signed by a person authorized to receive such payment.

At any time when the principal of said loan, with overdue interest added thereto, shall equal the cash surrender value of said policy, then the policy shall become void and of no effect at the time and upon the conditions provided therein for such contingency. If the policy contains no provisions for avoidance when the principal with overdue interest shall equal the [52] cash surrender value, then the policy shall become null and void after one month's notice to that effect.

Any notice in connection with this loan duly addressed and mailed to the last Post Office address of the undersigned known to the Company shall be deemed to have been duly given.

Executed at this day of 19 .

[Seal] GEORGE R. HALCOMB

P. O. Address—Box 445.

Number, Specify Street, Avenue, etc.

Town or City—Redding. State—Calif.

Witnes—A. E. DARM

Address—Redding, Calif.

.....[Seal]

P. O. Address—

Number, Specify Street, Avenue, etc.

Town or City— State—

Witness—

Address—

Signatures must be in INK and each Signature duly witnessed. [53]

State of California,
County of Sacramento.—ss.

Wm. H. Devlin: being first duly sworn, on oath deposes and says he is a member of the firm of Devlin & Devlin & Diepenbrock, attorneys for the defendant in the within entitled proceeding and that he has read the foregoing and annexed Amended Answer and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated upon his information or belief, and as to those matters that he believes it to be true. That he makes this verification for and on behalf of said Metropolitan Life Insurance Company, for the reason that said corporation and all of its officers are absent from the County of Sacramento where affiant and said firm of attorneys have their offices.

[Seal] WM. H. DEVLIN

Subscribed and sworn to before me, this 29th day of September, 1933.

GRACE MARTINDALE

Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Sept. 29, 1933. Walter B. Maling, Clerk. [54]

[Title of Court and Cause.]

SPECIAL VERDICT.

Was there an implied contract between the pilot Ollie A. Rose and George R. Halcomb, for the payment of fare? (Answer "Yes" or "No") YES.

N. R. TAYLOR

Foreman.

[Endorsed]: Filed Oct. 4, 1933 at 4 P. M. Walter B. Maling, Clerk, By C. W. Calbreath, Deputy. [55]

[Title of Court and Cause.]

Before Kerrigan, District Judge.

Messrs. Huston, Huston and Huston of Woodland, California, attorneys for plaintiff.

Messrs. Devlin, Devlin and Diepenbrock, of Sacramento, California, attorneys for defendant.

MEMORANDUM OPINION.

The jury in this case found upon a special verdict that there was "an implied contract between the pilot Ollie A. Rose and George R. Halcomb for the payment of fare." This was upon the occasion of Rose's taking Halcomb and his wife up in one of his airplanes for the purpose of looking for Halcomb's brother who was lost. During the flight the fatal accident occurred in which every one in the plane was killed. The case is submitted to the Court upon certain issues of law raised in the case.

The defendant wrote a policy of insurance upon the life of the deceased George Halcomb contain-

ing a provision for double indemnity in case of death resulting from violent and accidental means, "provided, *** (6) that death shall not have resulted from bodily injuries sustained while participating in aviation or aeronautics except as a fare paying passenger, ***". It is contended that under the facts of this case, no contract might legally be implied and that the jury's special verdict is contrary to law. It is further contended that such an implied contract could not make the deceased a fare paying passenger within the provision of the policy. The latter is a question of the construction of the insurance contract and one of law for the Court. [56]

It is undisputed that the pilot Rose did not have a transport pilot's license and under the regulations of the Department of Commerce (Section 46, subd. (e) of Air Commerce Regulations), which have the force of law (Section 173 of 49 U.S.C.A.), and under the law of California (1929 Cal. Stats. pp. 1874-1877) he was forbidden to take up passengers for hire. He had, however, a private pilot's license which entitled him to take up passengers as guests. The pilot was a partner in a commercial aviation business, which took up passengers for hire. All the previous dealings between the deceased and this pilot or with his concern were on a commercial basis. There is no evidence to show that the deceased knew that the pilot had no right to take up fare paying passengers, and I so find. That being true, the deceased had no knowledge

of any illegality in the contract and he innocently requested the service for which the jury has found there was an implied promise to pay.

It is true that if the fatal accident had not occurred and Halcomb had refused to pay, Rose could not have enforced the implied contract because the law forbade his making it unless he had a transport pilot's license. This is so elementary that citation of authority is not necessary. This does not mean, however, that the contract itself may not be implied and may not in certain respects be enforceable.

The contract in question is not forbidden because it is malum in se like a gambling contract; it is merely malum prohibitum for the better protection of the public using airplines commercially. The party to the latter type of contract who has no knowledge of the other parties want of capacity to make the particular contract is not shorn of all legal rights with reference thereto. In California in cases where securities are sold without a permit under the Blue Sky Law if the purchaser has acted innocently, the law does not leave the parties in status quo as it [57] does in the cases of contracts malum in se, but permits him to recover the consideration paid for the worthless and void securities. Hemmeon vs. Amalgamated Copper Mines Co., 95 Cal. App. 400; Becker vs Stineman, 115 Cal. App. 740. On this basis I believe that the jury might legally find that there was an implied contract between the deceased and Rose and that the deceased was to be a fare paying

passenger,—true a contract not capable of enforcement by Rose, but one which conferred certain rights upon the innocent party thereto. and which for certain purposes had a legal existence. This view seems particularly just where, as here, the real party in interest is not even a party to the contract but whose rights depend upon its existence.

Did this implied contract make the deceased a fare paying passenger, within the provisions of the policy? Accepting as I do the jury's verdict there was an implied contract to pay a fare, to hold that it did not make the deceased a fare paying passenger would twist language beyond its plain meaning. It would involve rewriting the exception in the insurance contract to provide that the insured must be "a fare paying passenger upon an airplane operated by a duly licensed transport pilot." That would be a narrowing of the risk by interpretation contrary to the principle of law that insurance contracts are construed in case of doubt against the insurer who wrote the instrument.

This, moreover, is a practical solution of the problem. A man seeking to travel by air goes to a place where such transportation is sold. He does not feel that it is necessary to inquire if the pilot is a duly licensed transport pilot and the plane is licensed for the purpose. He is entitled to assume that the law has been complied with. Hemmeon vs Amalgamated Copper Mines Co., supra. [58]

I find that the deceased was a fare paying passenger within the meaning of that term in the

contract of insurance and the plaintiff is entitled to the double indemnity feature of the policy.

The issue of whether the tender of the primary liability was a legal tender is, in view of these findings, no longer a factor in the case. Plaintiff is entitled to judgment for $4,000.00 with interest at 3½ percent, as provided in the policy, from the date of death of the insured less the indebtedness due from said insured to said insurance company upon the policy, together with costs of suit.

I adopt this opinion as my findings of fact and conclusions of law in this case. Parker vs St. Sure, 53 Fed. 2nd, 706. As to any issue not expressly covered by the verdict of the jury and this opinion, I find generally in favor of the plaintiff.

Let judgment be entered accordingly.

Dated this 20th day of October, 1933.

FRANK H. KERRIGAN
U. S. District Judge.

[Endorsed]: Filed Oct. 20, 1933. Walter B. Maling, Clerk. [59]

[Title of Court and Cause.]

JUDGMENT.

The above entitled cause came on regularly for trial on the 3rd day of October, 1933, L. C. Smith, Esq., and Messrs. Huston, Huston & Huston appearing as attorneys for the plaintiff, and Messrs. Devlin & Devlin & Diepenbrock appearing as attorneys for the defendant; a jury of twelve persons

was duly and regularly impaneled and sworn to try said cause; evidence, oral and documentary was thereupon offered and admitted; and by stipulation of the parties, the following special verdict be submitted to the jury:

> "Was there an implied contract between the pilot Ollie E. Rose and George R. Halcomb, for the payment of fare? (Answer 'Yes' or 'no').
>
> .....
>
> Foreman."

and it having been further stipulated that all other issues may be found by the Court, provided that said stipulations were agreed to be subject to and without prejudice to all objections and exceptions taken and reserved by the defendant herein: that said special verdict was returned by said jury with the finding of "Yes", and signed by the foreman; and the Court having heretofore made and entered its findings of fact and conclusions of law as to the other issues involved in the case;

IT IS THEREFORE ORDERED, adjudged and decreed as follows:

That the plaintiff Amos Halcomb, as administrator of the estate of George R. Halcomb, also known as George Raymond Halcomb, deceased, do have and recover from the defendant, Metropolitan Life Insurance Company, a corporation, the sum of [60] Four Thousand Ninety-two and 65/100 Dollars ($4,092.65), together with interest thereon from the date of this judgment until paid at the

rate of seven per cent (7%) per annum, and also for costs herein taxed at the sum of Seventy-six and 70/100 Dollars ($76.70).

Entered on this 30th day of October, 1933.

WALTER B. MALING,
Clerk,
By F. M. LAMPERT,
Deputy Clerk. [61]

[Title of Court and Cause.]

MOTION OF DEFENDANT FOR ORDER GRANTING NEW TRIAL.

The above named defendant, Metropolitan Life Insurance Company, a corporation, hereby moves for an order of the above entitled Court granting it a new trial in the above entitled action, and in support thereof presents the following:

I.

That the special verdict submitted to the jury in the above entitled action on October 4, 1933, to-wit:

"Special Verdict

"Was there an implied contract between the pilot Ollie A. Rose and George R. Halcomb, for the payment of fare? (Answer "Yes" or "No")

.....

Foreman."

was returned by said jury with the finding of "Yes", and which said special verdict so made and rendered by the jury was entered in the above en-

titled Court on said 4th day of October, 1933; that a motion on behalf of the defendant for an order granting a new trial as to said special verdict submitted to said jury was duly and regularly filed herein on the 13th day of October, 1933, and noticed for hearing on the 13th day of November, 1933, at the hour of 10:00 o'clock A. M.; that a copy of said motion of the defendant for an order granting a new trial as to said special verdict is hereto attached, marked Exhibit "A", and by reference thereto made a part hereof for every purpose.

II.

That upon the rendering of said special verdict in the foregoing paragraph referred to, the said Court retained jurisdiction of the cause for the making and entering of a judgment pursuant to said special verdict and the law, and that thereafter [62] the above entitled Court duly and regularly made its judgment in favor of said plaintiff and against the defendant in the sum of Four Thousand, ninety-two and 65/100ths Dollars ($4.092.65), together with interest thereon from the date of said judgment until paid at the rate of seven per cent (7%) per annum, and costs, and that said judgment was duly and regularly entered on the 30th day of October, 1933.

III.

In support of this motion, the defendant above named presents the following:

That this motion for a new trial in the above entitled action is based upon each of the following causes, each of which materially affects the sub-

stantial rights of said defendant, Metropolitan Life Insurance Company:

(a) Upon each of the grounds and causes set forth in the motion of this defendant for an order granting a new trial as to the special verdict which was filed in the above entitled Court on the 13th day of October, 1933, a copy of said motion being hereto attached and marked Exhibit "A".

(b) The insufficiency of the evidence to justify said judgment.

(c) That said judgment is against law.

(d) Errors at law occurring at trial and excepted to by defendant.

IV.

The following particular errors at law occurring during the trial of said cause are relied upon, and are hereby specified:

(a) Each of the errors at law specified in Paragraph II of the motion of defendant for an order granting a new trial as to the special verdict, which said motion is hereto attached, marked Exhibit "A", and by reference thereto, made a part hereof for every purpose. [63]

(b) That the above entitled Court erred in failing and refusing to grant the motion of the defendant for a nonsuit.

(c) That the above entitled Court erred in denying the motion of the defendant for a directed verdict.

V.

In support of this motion for an order granting said defendant, Metropolitan Life Insurance Com-

pany, a new trial, said defendant relies, and at the hearing of this motion will rely, upon the following:

(a) All pleadings and papers on file in the above entitled action.

(b) Upon the minutes of this Court.

(c) Upon the stenographic reports of all testimony adduced at the trial, and also all exhibits introduced and received in evidence.

VI.

That by hereby moving this Court for an order for a new trial after judgment made and entered in favor of the above named plaintiff and against the above named defendant, the defendant is exercising the right and privilege reserved in its said motion for an order for a new trial as to said special verdict heretofore rendered and entered, and this defendant does hereby consolidate with and incorporate in this motion said motion of the defendant for an order granting a new trial as to said special verdict, with the same force and effect as though said motion, which is hereto attached and marked Exhibit "A", were fully set forth herein.

Dated, November 7, 1933.

METROPOLITAN LIFE
INSURANCE COMPANY,
By DEVLIN & DEVLIN
& DIEPENBROCK
Its Attorneys,
Defendant.

DEVLIN & DEVLIN & DIEPENBROCK
Attorneys for Defendant. [64]

EXHIBIT "A".

Comes now the above named defendant, Metropolitan Life Insurance Company, and moves the above entitled Court for an order granting a new trial as to the special verdict submitted to the jury in the above entitled action on October 4, 1933, to-wit:

"Special Verdict

"Was there an implied contract between the pilot Ollie A. Rose and George R. Halcomb, for the payment of fare? (Answer "Yes" or "No") .....

.....

Foreman."

which said special verdict was returned by said jury with the finding of "Yes", and which said special verdict so made and rendered by the jury was entered in the above entitled Court on said 4th day of October, 1933. That said Court retained jurisdiction of said cause for the making and entering of a judgment pursuant to said finding and the law; that said judgment has not been rendered and/or entered as of the date hereof.

In support of this motion, the defendant above named presents the following:

I.

That this motion for a new trial as to the said special verdict is based upon each of the following causes, each of which materially affects the substantial rights of the said defendant, Metropolitan Life Insurance Company:

(a) Insufficiency of the evidence to justify the special verdict.

(b) That said special verdict is against law.

(c) That said special issue or verdict should not have been submitted to the jury for the reason that it involves no question of fact.

(d) That it is beyond the province of a jury to pass upon said issue so submitted as it involves a consideration of a [65] question of law, and also because it is a conclusion of mixed law and fact and not a verdict upon fact alone.

(e) That errors at law occurred at the trial and were excepted to by the defendant.

II.

That the following particular errors at law occurring during the trial of said cause are relied upon, and are hereby specified:

(a) That the above entitled Court erred in overruling the several objections of the defendant above named to the questions propounded to the witness, Elmer Halcomb, in reference to the negotiations for the transportation of George R. Halcomb and Richard Halcomb in the aeroplane of said Ollie A. Rose, and the contract of transportation, and the transportation of said parties in said aeroplane, and also in reference to the payment of fare, all of which occurred many months prior to the aeroplane flight in question.

(b) The failure and refusal of the Court in giving the defendant's proposed instructions and or as modified by the Court, to-wit: Defendant's Proposed Instructions Nos. 3, 4, 5, 6, and 8, and each

of them, as filed with the Clerk of the Court and presented to the Court before the instructions were given, and the failure to give each of said instructions was duly excepted to by said defendant, Metropolitan Life Insurance Company, after the reading of the instructions given by the Court and before the jury retired for the purpose of considering the cause.

(c) The giving by the Court of the plaintiff's proposed instructions and/or as modified and altered by the Court, to-wit: Plaintiff's Proposed Instructions Nos. 3, 4, 6, 9, and 10, and each of them, as filed with the Clerk of the Court and presented to the Court before the instructions were given, and the giving of each of said instructions was duly excepted to by said defendant, Metropolitan Life Insurance Company, after the reading of [66] the instructions given by the Court and before the jury retired for the purpose of considering the cause.

III.

That after the submission to said jury of said special verdict and the return and the making of said special verdict by said jury, the trial of said above entitled cause continued before the above entitled Court on a question of law as to whether or not judgment should be entered in favor of either of the respective parties, which said question of law was duly and regularly argued by counsel for the respective parties before the above entitled Court; that said matter is now submitted to the above entitled Court for its decision and for mak-

ing and entering a judgment herein, and the decision of the above entitled Court has not as of the date hereof been rendered, and no judgment has been made or entered herein. That this motion is made for the sole purpose of protecting the rights of the defendant, Metropolitan Life Insurance Company, in the event that judgment is hereafter made and entered in favor of the above named plaintiff and against the above named defendant, to move this Court for an order for a new trial upon the errors above specified in the submission to said jury of such special verdict and in said jury's making and rendering its said special verdict.

In the event that the judgment of the above entitled Court in the above entitled matter shall be made in favor of the defendant, Metropolitan Life Insurance Company, the said defendant hereby reserves the right and privilege of withdrawing this motion without any prejudice whatsoever to all rights of said defendant in and to said judgment. That this motion is also made without prejudice to the right and privilege of this defendant, Metropolitan Life Insurance Company, of moving this Court for an order for a new trial after judgment is made and entered in favor of the above named plaintiff and against the above named defendant, if such be made and entered, and which said motion may be based [67] upon the grounds that may be set forth in a written motion prepared and filed by the above named defendant in the event a judgment shall be entered against said defendant, Metropolitan Life Insurance Company, and also to take

such other steps and proceedings to protect the right and privilege of said defendant to move this Court for an order for a new trial, or to protect an appeal to the Circuit Court of Appeals for the Ninth Circuit from any such judgment as may be made and entered and said special verdict of the jury, upon any and all grounds that said defendant may desire to set forth in a bill of exceptions duly presented and filed with the above entitled Court.

IV.

In support of this motion for an order granting said defendant, Metropolitan Life Insurance Company, a new trial, said defendant relies, and at the hearing of this motion will rely, upon the following papers:

(a) All pleadings and papers on file in the above entitled action.

(b) Upon the minutes of this Court.

(c) Stenographic report of all testimony adduced at the trial, and also exhibits introduced and received in evidence.

Dated, October 13, 1933.

METROPOLITAN LIFE
INSURANCE COMPANY,
By DEVLIN & DEVLIN
& DIEPENBROCK,
Its Attorneys,
Defendant.

DEVLIN & DEVLIN & DIEPENBROCK
Attorneys for Defendant.

[Endorsed]: Filed Nov. 7, 1933. Walter B. Maling, Clerk. [68]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday the 16th day of April, in the year of our Lord one thousand nine hundred and thirty-four.

PRESENT: The Honorable FRANK H. KERRIGAN, District Judge.

NO. 1034-S

AMOS HALCOMB, ETC.

vs.

METROPOLITAN LIFE INSURANCE CO.

The Defendant's motion for new trial having been heretofore submitted to the Court, now after due deliberation had thereon, Ordered that the motion for new trial be denied. [69]

[Title of Court and Cause.]

PETITION FOR APPEAL.

TO THE HONORABLE FRANK H. KERRIGAN, Judge of the United States District Court, in and for the Northern District of California, Northern Division:

Now comes Metropolitan Life Insurance Company, a corporation, defendant, by Messrs. Devlin

& Devlin & Diepenbrock, its attorneys, and respectfully shows:

That on the 4th day of October, 1933, a jury duly impaneled found a special verdict, and upon said special verdict a judgment was therein entered whereby it was adjudged that the plaintiff recover of and from the defendant Four Thousand Ninety-two and 65/100ths Dollars ($4,092.65), together with interest thereon from the date of said judgment until paid at the rate of seven per cent (7%) per annum, and also for costs therein taxed in the sum of Seventy-six and 70/100ths Dollars ($76.70), and motion for new trial was denied on the 16th day of April, 1934.

Your petitioner feeling itself aggrieved by the special verdict of the jury and the judgment rendered thereon, as aforesaid, hereby petitions the above entitled Court for an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons specified in the assignment of errors filed herewith.

Wherefore, your petitioner prays that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit be allowed and that an order be made fixing the amount of security which the defendant shall furnish upon such appeal, and upon [70] giving such security all further proceedings of this Court be suspended and stayed until the determination of said Appeal by the United

States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated, June 4, 1934.

METROPOLITAN LIFE
INSURANCE COMPANY,
a corporation,
By WM. H. DEVLIN
Its Attorneys.

DEVLIN & DEVLIN & DIEPENBROCK
and HORACE B. WULFF,
Attorneys for Defendant.

[Endorsed]: Filed June 6, 1934. Walter B. Maling, Clerk. [71]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the defendant, Metropolitan Life Insurance Company, a corporation, and files the following assignment of errors which it avers occurred upon the trial of the cause, and upon which it will rely upon its prosecution of the appeal in the above entitled cause:

I.

That the Court erred in refusing to charge the jury as requested by said defendant in its proposed instruction No. 1, which is as follows, to-wit:

> "You are hereby directed to render your verdict in favor of the plaintiff, Amos Halcomb, as Administrator of the Estate of George R.

Halcomb, also known as George Raymond Halcomb, deceased, and against the defendant, Metropolitan Life Insurance Company, a corporation, in the sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20), and no more."

II.

That the Court erred in refusing to charge the jury as requested by said defendant in its proposed instruction No. 4, which is as follows, to-wit:

"You are instructed that in the event you find that no fare was paid or agreed to be paid by said George R. Halcomb to Ollie A. Rose, the pilot and owner of the aeroplane in question, in consideration of the said transportation of said George R. Halcomb in said aeroplane, then and in that event, I direct you that the plaintiff is not entitled to recover under and pursuant to the double indemnity clause set forth in said policy of life [72] insurance and that you must return your verdict in favor of the plaintiff and against the defendant in the sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20), and no more."

III.

That the Court erred in refusing to charge the jury as requested by said defendant in its proposed instruction No. 6, which is as follows, to-wit:

"The Court instructs the jury that, as a matter of law, in this case there is no burden on

the defendant to disprove the allegations of plaintiff's complaint; that the burden of proving such allegations rests upon the party alleging the same, and in this case the burden rests upon plaintiff to establish his case and to prove all the allegations of the complaint (except those allegations admitted by the answer) by a preponderance of the evidence, and if you find that the weight of the evidence bearing on the whole case is in favor of the defendant, or that it is evenly balanced, then the plaintiff can recover a verdict at your hands in the sum of Nineteen Hundred Twenty-nine and 20/100ths dollars ($1,929.20), and no more, which is the amount the defendant admits is due and payable to plaintiff under the terms of said policy."

IV.

That the Court erred in refusing to charge the jury as requested by said defendant in its proposed instruction No. 8. which is as follows, to-wit:

"You are hereby instructed that you cannot infer in this case that the decedent George R. Halcomb paid fare to Ollie A. Rose, for the aeroplane flight involved in this case, from the fact that the said Ollie A. Rose on a prior [73] occasion violated the law which prohibited him from accepting fare or compensation from any person for conveying him in his aeroplane, or, in other words, the fact that the said Rose may have accepted fare or compensation on another occasion, which he had no legal right to do,

will not justify any inference that he collected fare or compensation from the said George R. Halcomb for the flight in question. To the contrary, I hereby instruct you that in the event you find that there is an absence of evidence as to whether a fare was charged or paid by Halcomb to Rose for said transportation in the aeroplane in question, it must be presumed by you that said Ollie A. Rose obeyed the law and did not accept compensation for the aeroplane flight on which the said George R. Halcomb was killed."

V.

That the Court erred in charging and instructing the jury as follows:

"The evidence in this case establishes that Ollie A. Rose, the pilot of the aeroplane in which George R. Halcomb was killed, was possessed of a private pilot's license at the time of the accident which resulted in the death of said George R. Halcomb, and that such pilot, Ollie A. Rose was prohibited by the laws of the United States of America, and the State of California from carrying persons or property for hire.

"You are instructed that the law presumes in the absence of evidence to the contrary, that a person is innocent of wrong, and that the ordinary course of business has been followed, and that the law had been obeyed. This presumption is to be considered with all the other

evidence in the case, to determine whether or not George R. Halcomb was a fare paying passenger in the wrecked aeroplane." [74]

VI.

That the Court erred in charging and instructing the jury as follows:

"Indirect evidence is of two kinds; inferences; and presumptions. An inference is a deduction which the reasoning of the jury makes from the facts proved, without an express direction of law to that effect. A presumption is a deduction which the law expressly directs to be made upon the particular facts."

VII.

That the Court erred in charging and instructing the jury as follows:

"Presumptive or circumstantial evidence is admissible in civil cases. In this case it is not necessary that the plaintiff produce direct evidence that the deceased was a fare paying passenger, as alleged in the complaint, but such fact may be inferred from all the circumstances in the case."

VIII.

That the Court erred in charging and instructing the jury as follows:

"It is for you gentlemen of the jury to say, from all the evidence in this case, whether

there was an implied contract that the deceased was to pay a fare for the use of the plane."

IX.

That the Court erred in overruling the following objections of the defendant to the introduction in evidence of the testimony of witness Daniel Franklin Halcomb:

"Q. And have you been at the air port at any time when Ollie Rose, the deceased, hauled your deceased brother, George Halcomb in the Travelaire open three passenger plane?

"Mr. WULFF: Just a minute, we object,—The evidence now shows that Mr. Rose did not carry passengers for hire; they are trying to show he went up once for hire, and went up this time, but [75] now the evidence shows two inferences may be drawn from one fact, and it is a familiar principle of law that when such circumstances exist, no inference can be drawn from that fact.

The COURT: Objection overruled,—Exception. You may answer the question.

A. Yes, Sir.

Mr. SMITH: Q. Will you just state the circumstances to the court and jury please, Mr. Halcomb, under which you made this observation; that is, do you remember about how long it was before the accident that you saw this?

A. I would say it was about two weeks before the time that the three generations had went up.

Q. That is the way you fix the time in your mind?

A. I believe that is it, two weeks.

Q. And you know the exact time?

A. No, I do not.

Q. Who went up with Mr. Rose?

A. My brother George Halcomb, and my younger brother Richard.

Q. Who took them up to the air port?

A. I went along with them; my brother drove the car.

Q. Your brother George Halcomb drove the car? A. Yes, Sir.

Mr. WULFF: Your Honor, may my objection run to all this line of testimony, and exception noted?

The COURT: Yes, objection overruled, and exception noted.

Mr. SMITH: Q. Did your brother George Halcomb pay to Ollie Rose any money as hire for that aeroplane transportation?

Mr. WULFF: I object to this question on the further ground the word 'hire' is merely conclusive.

Mr. SMITH: All right, I will strike that out,— Q. Did George Halcomb pay to your brother any money either before or after,—I think I have got that wrong,—Did your brother George Halcomb pay to Ollie Rose any money either before or after he went up in this aeroplane? [76]

Mr. WULFF: Same objection, if your Honor please.

The COURT: Objection overruled, and exception.

A. Yes, Sir; before he went up in the aeroplane.

Mr. SMITH: Q. A little louder, please? A. Yes, before he went up in the aeroplane he did.

Q. Was there any conversation took place prior to paying of this money?

Mr. WULFF: Same objection.

The COURT: Objection overruled and exception. A. Yes, there were. Mr. Rose come to the car and asked my brother if he wanted to go up, so my brother asked how much it would be,—

The COURT: Interposing: Now, you had two brothers in there,—Will you just say which one?

A. George Halcomb asked how much it would cost, and Rose said he would take all of us up for three dollars.

Q. Take the three of you up? A. Two of us up.

Q. There were three in the car, but he said he would take three of us up, and he took the three of you up, did he?

A. No, Sir; there was two.

Q. There were three in the car? A. There were three in the car, and he stated he would take two up for three dollars. My younger

brother Richard had been asking George to take him up several times, so I told him to take my younger brother up, so those two and Mr. Ollie Rose got in the plane.

Mr. SMITH: Q. Did you see them take off?

A. Yes, Sir.

Q. Do you recall about how long they were in the air?

A. I would say about five minutes.

Q. Did you wait there for them to return?

A. Yes, Sir.

Q. Who got out the cockpit, if you know, when they returned?

A. Ollie Rose got out of the pilot's compartment.

Q. How old was your youngest brother that went up in the plane?

A. Seven years old. [77]

Q. Now, I understand there were three of you in the car, but only two of you went up in the plane, is that right?

A. Yes, Sir.

Q. That was yourself and your brother George Halcomb, and your brother Richard Halcomb,—I think that is all."

X.

That the Court erred in denying the defendant's motion for nonsuit duly made and presented at the close of plaintiff's case.

XI.

That the Court erred in submitting to the jury the special verdict, which was in the following language, to-wit:

> "Was there an implied contract between the pilot Ollie A. Rose and George R. Halcomb, for the payment of fare?"

XII.

That the Court erred in submitting to the jury any issue involved in the above entitled case in this, that all issues were withdrawn from the jury upon each of the parties to said action moving the Court for a directed verdict.

XIII.

That the Court erred in each and every particular of its charge to the jury, in this, that the Court should have withdrawn the issue and all issues from the jury and directed a verdict for the defendant.

XIV.

That the special verdict of the jury is against evidence in that no evidence was adduced showing that George R. Halcomb was a "fare paying passenger" in the aeroplane in which he met his death.

XV.

That the special verdict of the jury is against evidence in that from all evidence adduced at the trial it was shown that [78] there was no contract, expressed or implied, by and between plaintiff's in-

testate, George R. Halcomb, and Ollie Rose, the pilot of the aeroplane in question, wherein and whereby said George R. Halcomb agreed to pay a fare.

XVI.

That the judgment is against law in that it is not supported by evidence in respect to Paragraphs XIV and XV hereinabove set forth, and further, the evidence shows without conflict that pilot Rose was prohibited by law from transporting passengers for hire or fare, and any contract, expressed or implied, to transport passengers for hire or fare was by the laws of the State of California and of the United States illegal.

WHEREFORE, the defendant, Metropolitan Life Insurance Company, prays that the judgment of the District Court be reversed.

Dated, June 4, 1934.

DEVLIN & DEVLIN
& DIEPENBROCK,
HORACE B. WULFF
Attorneys for Defendant

[Endorsed]: Filed June 6, 1934. Walter B. Maling, Clerk. [79]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The petition of Metropolitan Life Insurance Company, a corporation, defendant, for an order allowing an appeal, based upon the assignment of

errors filed contemporaneously therewith, coming on regularly this day to be heard, and the Court being duly advised,

It is hereby Ordered that an appeal as prayed for in said petition be allowed, provided that the said defendant give a good and sufficient bond in the sum of Fifty five Hundred Dollars ($5500.00) to the effect that said defendant shall prosecute its appeal with effect, and answer all damages and costs if it fails to make its plea good, the said bond to be approved by this Court, and that thereupon all further proceedings in this Court be suspended and stayed until the determination of said appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, June 6, 1934.

HAROLD LOUDERBACK
Judge of the United States
District Court

[Endorsed]: Filed June 6, 1934. Walter B. Maling, Clerk. [80]

[Title of Court and Cause.]

Whereas, the Defendant in the above entitled action, has appealed to the United States Circuit Court of Appeals, Ninth Circuit, from a judgment made and enterd against it in said action, in the United States District Court for the Northern District of California, Northern Division, in favor of the Plaintiff in said action on the 30th day of October, 1933, for Four Thousand Ninety two and

65/100 ($4,092.65) Dollars, and Seventy six and 70/100 ($76.70) Dollars, costs of suit, and

Whereas, the appellant is desirous of staying the execution of said judgment so appealed from,

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, National Surety Corporation, a corporation having its head office in the City of New York, duly incorporated under the laws of the State of New York for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California, respecting such corporations, does hereby undertake and promise on the part of the appellant and does acknowledge itself justly bound in the sum of Five Thousand Five Hundred and no/100 ($5,500.00) Dollars; that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal; and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the United States Circuit Court of Appeals, Ninth Circuit, in the Court from which the appeal is taken, judgment may be entered in the said action on [81] motion of respondent (and without notice to the undersigned surety) in his favor against the said surety, for such amount, to-

gether with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

And further it is expressly understood that the National Surety Corporation, as surety hereunder, in case of a breach of any condition of this bond, agrees that the Court in the above entitled matter may, upon notice to it of not less than ten days, proceed summarily in the action, suit, case, or proceeding, in which the same is given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

In Witness Whereof, the said National Surety Corporation has caused this obligation to be signed by its duly authorized Attorney-in-fact and its corporate seal to be hereunto affixed at San Francisco, California, this 7th day of June, 1934.

NATIONAL SURETY
CORPORATION,
(Seal) By R. W. STEWART
Attorney in fact.

State of California,
City and County of San Francisco.—ss.

On this 7th day of June in the year one thousand nine hundred and 34, before me Emily K. McCorry a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared R. W. Stewart known to me to be the duly authorized Attorney in Fact of National Surety Corporation, and the same person whose name is subscribed to the within instrument

as the Attorney in Fact of said Corporation, and the said R. W. Stewart acknowledged to me that he subscribed the name of National Surety Corporation thereto as principal, and his own name as Attorney in Fact.

In Witness Whereof, I have hereunto set my hand and [82] affixed my official seal the day and year in this Certificate first above written.

(Seal) EMILY K. McCORRY

Notary Public in and for the City and County of San Francisco, State of California

The above and foregoing bond is hereby approved.

HAROLD LOUDERBACK,
Judge.

[Endorsed]: Filed June 8, 1934. Walter B. Maling, Clerk. [83]

In the United States District Court, for the Northern District of California, Northern Division.

No. Law 1038-S.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, deceased,

Plaintiff.

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That the trial of the above entitled cause came on regularly on the 3rd

day of October, 1933, before Honorable FRANK H. KERRIGAN, Judge presiding, and a jury, upon the complaint of plaintiff and the answer of defendant, plaintiff appearing by his attorneys, MESSRS. L. C. SMITH and ARTHUR C. HUSTON, and defendant appearing by its attorneys, MESSRS. DEVLIN & DEVLIN & DIEPENBROCK and HORACE B. WULFF, and thereupon the following proceedings were had:

The Clerk called the roll of the venire and twelve (12) veniremen were called to the jury-box and sworn on their voir dire by the Clerk. Thereupon a jury consisting of twelve (12) persons was duly impanelled, and thereuupon the following proceedings were had:

TESTIMONY OF ETHEL J. ROSE, FOR PLAINTIFF.

Ethel J. Rose was then called and sworn as a witness on behalf of plaintiff, and testified as follows:

Direct Examination.

By L. C. Smith, Esq., of Counsel for Plaintiff. [84]

My name is Ethel J. Rose. I reside at Redding, California, and have resided at Redding for some years. I am the wife of Ollie Rose, deceased. My husband had two aeroplanes which he let out for hire, one of which was a Travelaire and the other was a Ryan; the Ryan was a J-5 Motor, and the Travelaire was a "0X6". The Ryan plane carried

(Testimony of Ethel J. Rose.)

five passengers and a pilot, which is called a six place job. The Travelaire had a seating capacity for the pilot and two passengers. It was the Travelaire which was involved in this accident. My husband had had the Travelaire for over two years and Ryan a little over a year. During the ownership of these planes my husband used them commercially. We were running a school for students, and any jobs that he could work up. During all the time that my husband owned these planes, he used them to give lessons to students, and also for making trips any place. This busines was known as the "Rose Air Service", and he also advertised his said business. He had tickets prepared which he sold to prospective customers at the Air Port. The following as a sample of the tickets used.

Mr. SMITH: We ask that this be admitted.

The COURT: It will be admitted and marked Plaintiff's Exhibit No. 1.

The ticket read as follows: No. 650, date blank, and to,—Amount of dollars sign,—Number of passengers blank, name of passenger blank, then another blank space,—Sold to blank. The ticket was perforated, and the larger portion of the ticket bears the same number, 650, date purchased blank, —Rose Air Service,—blank,—Trip to blank, Passenger's signature blank, amount dollars blank, sold by blank. Then, the number 650, also corresponding number, Pilot's stub ticket, void without this. The [85] admission into evidence of the printed matter on the back of the ticket was re-

(Testimony of Ethel J. Rose.)

jected, and the jury was instructed to disregard it, all upon objection of the counsel for the defendant.

I have done some flying myself, and I have frequented the air port known as "Benton's Air Port". It was the place where my husband sheltered his planes. I have sold tickets to passengers who were carried on both of the planes. My husband in the conduct of his said business had no set route, or anything like that; the planes were just rented out in the field to go anywhere anyone wanted to go to,— we did have scheduled tours made and had reckoned up about what the mileage to those places was, and what the rate would be, what the price would be, and those were advertised; for instance, like going out to Mt. Lassen, I think they charged $35.00, something like that; if anyone wanted to go, they could call up and find out how much it would cost, but there were no regular runs. I think they only made two trips over the mountain anyway.

In determining the rate charged for transportation, we estimated the time necessary to go between the two points and figured the charge so much an hour. It was figured, with the Ryan plane, that they couldn't make anything unless they could get at least $30.00 an hour; it was a heavy plane that carried eighty gallons of gas, besides six passengers; it was heavy to operate, so they figured on $30.00 an hour. I think with the Travelaire they figured about $7.50 an hour, which is the regular rate on that. When the boys were taking it out on lessons,

(Testimony of Ethel J. Rose.)

it was $15.00 an hour, with an instructor, and after the boys had soloed, made a solo flight, and were flying alone, then the rate was $10.00 an hour; but I think that figure of about $7.50 an hour would really operate [86] the plane.

My husband operated both of these planes at the Benton Air Port, at Redding, for the purpose of taking pasengers up in the air, for short flights, for given sums. For short flights from ten to twelve minutes $1.50 per person was charged, and they always tried to get five passengers in the Ryan, so that it would be $7.50, and they wanted to figure on four flights an hour. They also charged $1.50 per person for the Travelaire. Although the Travelaire was lighter to get up and down, it only remained in the air from seven to ten minutes, and they could make flights oftener, although they were shorter in time. The services of these planes were offered to any person who paid.

I was up at the Air Port nearly every time there was more or less of a crowd there, and kind of circulated around among the people I knew, and asked them why they didn't go up, et cetera, and if they wouldn't enjoy a ride, and selling tickets. My husband would likewise go in and about the crowd selling tickets.

My husband had been operating an aeroplane, I would say, for over a year prior to the accident.

I didn't know George Halcomb until the day of the accident. I didn't know who he was. My hus-

(Testimony of Ethel J. Rose.)

band had flown an aeroplane from 110 to 125 hours at the time of the crash.

I recall assisting Mr. George Halcomb and Mrs. Sadie Halcomb, his wife, and an elderly lady by the name of Mrs. Flagg, and also George Halcomb's infant child into the Ryan plane a little less than a year ago, or about two months prior to the accident, which was some time during the Spring. I know that George Halcomb paid my husband for that transportation. There was some newspaper publicity about the flight as there were three generations in one [87] plane, that is, Mrs. Flagg, who went, was a great grandmother, and the baby was less than a year old. On that trip Mr. Lund drove the Ryan. I never heard of any personal dealings or any particular flight relationship between Mr. George Halcomb and my husband, except the business transactions at the Air Port.

On the day of the accident, July 7, 1932, George Halcomb came to our house to see my husband, about twenty minutes of two P.M. In the conversation, my husband asked him what time he wanted to go and Mr. Halcomb pulled out his watch and looked at it, and said: "It is twenty minutes of two," "And, I have to go home first;" then he said "How will two o'clock be?" And my husband said, "All right, I will meet you at the air port at two o'clock, that will give me time to get the motor warmed up." On that day the Ryan plane was at Long Beach. We hadn't been doing so very well at Redding and Mr. Lund had taken the plane down there

(Testimony of Ethel J. Rose.)

in the hopes of picking up some fishing parties to bring up with him, and he had the plane down there with him at the time. Mr. Lund was the pilot who was employed by my husband.

Our house is kind of on a side hill, it is two stories in the rear, and just one story in the front, and the street running along there, Trinity Street, you come down about five or six steps, and we had an apartment there. On the 7th of July, 1932, we had had a late dinner, and were sitting at the table when I heard some one coming along the lawn. There was a woodshed window out there, you can see through, and I saw somebody coming, and I went to the door and looked out, and I saw it was Mr. Halcomb; I turned to my husband and said "It was George Halcomb"—Of course we all knew of the tragedy that had overtaken his—overtaken the family—so I stepped to my right to let my husband pass out. Mr. Halcomb [88] then said, "You know my brother is lost, and I came down to see if you would take me up in the plane, I thought we might be able to see him up from the air." My husband said, "Sure, I will do anything I can, anything under God's heaven I can do to help you, I am willing to do it." My husband then said, "When do you want to go, George?" and Mr. Halcomb replied, "As soon as possible." Mr. Halcomb then took out his watch and looked at it. He said it was twenty minutes to two now, "how will two o'clock do?" My husband said, "All right, I will meet you at the Air Port at

(Testimony of Ethel J. Rose.)

two o'clock, that will give me time to get the motor warmed up." Then Mr. Halcomb turned and went back up the steps. That was the last time I saw my husband.

Cross-Examination.

by Horace B. Wulff, Esq., of Counsel for Defendant.

My husband had operated a plane for over a period of two years, and had 110 or 125 flying hours. He possessed a private pilot's license, which did not permit him to carry passengers; he could go anywhere that he wanted to himself, if it was his own plane, but that would not permit him carrying passengers. Mr. Lund, whom we employed, was a transport pilot. I think he claimed between 2800 and 3000 hours, something like that, to his credit. It was my husband who had the private license. The pilot we hired had the transport license.

In my direct examination in speaking about my husband taking up passengers for short hauls for $1.50, I meant that the plane was operated by Mr. Lund. I do not know of an occasion when my husband ever piloted a plane for $1.50 for short trips, at least not within my knowledge. I have no knowledge of my husband ever hauling or carrying any passenger in an aeroplane for a fare, [89] and he never carried passengers for hire within my knowledge.

I heard the entire conversation between Mr. Halcomb and my husband at my home on July 7th, and in that conversation there was nothing whatever

(Testimony of Ethel J. Rose.)

mentioned in reference to the price or fare to be charged, nor did Mr. Halcomb say that he would make arrangements for that later.

My husband had flown the Travelaire before; I have been to Oakland, Los Angeles and all around with him.

The day the Halcomb family went up in the Ryan, I did not know Mr. Halcomb. I asked my husband who he was. The Ryan was piloted that day by a licensed pilot who possessed a transport license and who had the right to pilot a plane and carry passengers for hire. At the time that the Halcomb family went up in the Ryan, I asked my husband who George Halcomb was, and he said: "That is George Halcomb, don't you know him, he has been up around the air port, riding around,"—"You ought to know who he is." I took it for granted that he had been around the air port a good deal when I wasn't there, and had ridden, but the only occasion I ever saw him riding was the time in the Ryan. On that occasion I saw him pay a fare.

On the flight in which the accident occurred, if there were any arrangements made for a fare, I don't know when they were made, as I heard the entire conversation between Mr. Halcomb and my husband and there was nothing said about it. My husband upon a lot of occasions had taken passengers in the Travelaire without collecting any fee, or, in other words, gratuitously. [90]

TESTIMONY OF DANIEL FRANKLIN HALCOMB, FOR PLAINTIFF.

Daniel Franklin Halcomb was then called and sworn as a witness on behalf of plaintiff, and testified as follows:

Direct Examination

by L. C. Smith, Esq., of Counsel for Plaintiff.

I am seventeen years of age, and I am a brother of George Halcomb, deceased. I live in Redding and have lived there all my life. I know where the Benton Air Port is, and I have been a frequenter of that place. I know where Mr. Rose, during his lifetime, had his two aeroplanes sheltered.

"Q. And have you been at the air port at any time when Ollie Rose, the deceased, hauled your deceased brother, George Halcomb in the Travelaire open three passenger plane?

Mr. WULFF: Just a minute, we object,—The evidence now shows that Mr. Rose did not carry passengers for hire; they are trying to show he went up once for hire, and went up this time, but now the evidence shows two inferences may be drawn from one fact, and it is a familiar principle of law that when such circumstances exist, no inference can be drawn from that fact.

The COURT: Objection overruled,—Exception. You may answer the question.

A. Yes, Sir.

Mr. SMITH: Q. Will you just state the circumstances to the court and jury please, Mr.

(Testimony of Daniel Franklin Halcomb.)

Halcomb, under which you made this observation; that is, do you remember about how long it was before the accident that you saw this?

A. I would say it was about two weeks before the time that the three generations had went up. [91]

Q. That is the way you fix the time in your mind?

A. I believe that is it, two weeks.

Q. And you know the exact time?

A. No, I do not.

Q. Who went up with Mr. Rose?

A. My brother George Halcomb, and my younger brother Richard.

Q. Who took them up to the air port?

A. I went along with them; my brother drove the car.

Q. Your brother George Halcomb drove the car? A. Yes, Sir.

Mr. WULFF: Your Honor, may my objection run to all this line of testimony, and exception noted?

The COURT: Yes, objection overruled, and exception noted.

Mr. SMITH: Q. Did your brother George Halcomb pay to Ollie Rose any money as hire for that aeroplane transportation?

Mr. WULFF: I object to this question on the further ground the word 'hire' is merely conclusive.

(Testimony of Daniel Franklin Halcomb.)

Mr. SMITH: All right, I will strike that out,—Q. Did George Halcomb pay to your brother any money either before or after,—I think I have got that wrong,—Did your brother George Halcomb pay to Ollie Rose any money either before or after he went up in this aeroplane?

Mr. WULFF: Same objection, if your Honor please.

The COURT: Objection overruled, and exception.

A. Yes, Sir; before he went up in the aeroplane.

Mr. SMITH: Q. A little louder, please?

A. Yes, before he went up in the aeroplane he did.

Q. Was there any conversation took place prior to paying of this money?

Mr. WULFF: Same objection. [92]

The COURT: Objection ovverruled and exception.

A. Yes, there were. Mr. Rose come to the car and asked my brother if he wanted to go up, so my brother asked how much it would be,—

The COURT: Interposing: Now, you had two brothers in there,—Will you just say which one?

A. George Halcomb asked how much it would cost, and Rose said he would take all of us up for three dollars.

(Testimony of Daniel Franklin Halcomb.)

Q. Take the three of you up? A. Two of us up.

Q. There were three in the car, but he said he would take three of us up, and he took the three of you up, did he?

A. No, Sir; there was two.

Q. There were three in the car? A. There were three in the car, and he stated he would take two up for three dollars. My younger brother Richard had been asking George to take him up several times, so I told him to take my younger brother up, so those two and Mr. Ollie Rose got in the plane.

Mr. SMITH: Q. Did you see them take off? A. Yes, Sir.

Q. Do you recall about how long they were in the air?

A. I would say about five minutes.

Q. Did you wait there for them to return?

A. Yes, Sir.

Q. Who got out of the cockpit, if you know, when they returned? A. Ollie Rose got out of the pilot's compartment.

Q. How old was your youngest brother that went up in the plane? A. Seven years old.

Q. Now, I understand there were three of you in the car, but only two of you went up in the plane, is that right? [93]

A. Yes, Sir.

Q. That was yourself and your brother George Halcomb, and your brother Richard Halcomb,—I think that is all."

TESTIMONY OF FRANCES HALCOMB, FOR PLAINTIFF.

Frances Halcomb was then called and sworn as a witness on behalf of plaintiff, and testified as follows:

Direct Examination

by L. C. Smith, Esq., of Counsel for Plaintiff.

I am a sister of George Halcomb, deceased. My brother George Halcomb at the time of his death on July 7, 1932, was twenty-five years old; he would have been twenty-six in September, the 6th. His wife was twenty years of age, and she would be twnty-one in September, but I don't know the date. My brother George Halcomb and his wife lived in Redding, and there were just about fifty feet or something between our back yards. I saw my brother and his wife every day. They were both in good health, just as good as they could be.

"Q. Do you know that Mrs. Flagg, George Halcomb, your brother, and Ida May, and the baby got in the aeroplane, that day that they took a ride in the cabin plane?

A. I took them up in my car.

Mr. WULFF: I object to that as entirely immaterial; that was the three generations going up.

The COURT: I think so, but I will overrule it just the same.

A. I drove them up there in our car." [94]

The plaintiff then introduced in evidence the original policy of life insurance, which was admitted in evidence and marked Plaintiff's Exhibit No. 2.

The plaintiff rests.

The defendant then moved the Court for a nonsuit upon the grounds that it was not shown by any evidence whatsoever either offered in the case, or by such matters that the Court could take judicial knowldge that the decedent George R. Halcomb was a fare paying passenger, or within the terms of the policy which would entitle the representatives of the beneficiary to collect the insurance; and on the ground it appeared that there was no contractual right whatsoever between George R. Halcomb and the pilot, or any one else, and that consequently the provision of the policy, namely, of a fare paying passenger was not shown to exist by any evidence direct or implied, or by any deductions therefrom; and on the further grounds that the plaintiff had failed to make out a case in any degree for double indemnity. The defendant's motion for a nonsuit was denied, and exception noted.

The defendant then introduced into evidence the Air Commerce Regulations adopted by the United States of America, Department of Commerce, effective December 31, 1926, with certain sections indicated as amended and effective March 22, 1927; and to the section in effect July 1, 1927, calling particular attention to Subdivision D of Section 62,

page 28, which whole section is relative to the privileges and restrictions of licensed pilots, which are as follows:

> "(a) Transport pilots may pilot any type of licensed air craft, but shall not carry persons for hire in licensed air craft other than in conventional types [95] of heavier than air craft and within the classes specified in their license. Transport pilots shall demonstrate their ability to navigate land planes, sea planes, or both in one or more of the weight, classes set forth below,—(b) Limited commercial pilots shall have all of the privileges conferred and be subject to all of the restrictions imposed upon transport pilots, except that they shall not, for hire, instruct students in the operation of air craft in flight and they shall not pilot air craft carrying persons for hire outside of the areas mentioned in their licenses. (c) Industrial pilots may pilot any type of licensed air craft not carrying persons for hire, but shall not pilot unlicensed air craft carrying either persons or property for hire; (c) Private pilots not designated as students may pilot licensed air craft, but shall not carry persons or property for hire in licensed or unlicensed air craft. Private pilots designated as students are licensed only for the purpose of piloting licensed air craft,—"

The defendant then offered in evidence a certified copy of the license which was issued to Ollie Rose

on March 7, 1931, known and designated as a private pilot's license, expiring March 15, 1932, and extended to March 15, 1933, upon which license it is provided: "This certifies that the pilot whose photograph and signature appear hereon is a private pilot of 'Air Craft of the United States'. The holder may pilot all types of licensed air craft, but may not for hire, transport persons or property, nor [96] give piloting instructions to students." Said license was admitted in evidence and marked Defendant's Exhibit No. 3.

It was thereupon stipulated in open court by and between counsel for plaintiff and defendant that the liability of the defendant to the plaintiff, under the principal or single indemnity clause of the policy, is $1,929.20. Thereupon, the defendant introduced in evidence a loan certificate and assignment of policy, which was admitted in evidence and marked Defendant's Exhibit No. 4.

TESTIMONY OF C. H. DOBBINS, FOR DEFENDANT.

C. H. Dobbins was then called and sworn as a witness on behalf of defendant, and testified as follows:

Direct Examination

by Horace B. Wulff, Esq., of Counsel for Defendant.

In the year 1932 I was the manager of Metropolitan Life Insurance Company at Chico, California.

(Testimony of C. H. Dobbins.)

My territory embraced all of Tehama County, including Redding.

In September, 1932, I had occasion to confer with Mr. L. C. Smith, attorney for Amos Halcomb, as administrator of the estate of George R. Halcomb, and at that time I tendered to him the payment due under the single liability clause under the policy of George R. Halcomb. This tender was made in the form of a certified check of the Metropolitan Life Insurance Company. Mr. Smith made no objection to the amount set forth in said check, nor did he object to the fact that the offer was not made in currency, or other legal tender. Mr. Smith accepted the check and retained it in his possession until he found out that we wouldn't pay full indemnity, then he asked me to return the policy [97] as he intended to sue the company. Later I returned the policy to him with a copy of the death claim papers. The tender, in accordance with my records, was made on September 8, 1932.

Cross-examination

by L. C. Smith, Esq., of counsel for Plaintiff.

I was at Mr. Smith's office three different times. On the first visit, Mr. Smith gave me the policy with the completed death claim papers, which I retained until Mr. Smith asked that the same be returned to him, which was on September 8th, and the papers were returned to him on September 12th. Mr. Smith did not give me a receipt for the check as full pay-

(Testimony of C. H. Dobbins.)

ment for the policy, because we considered the policy as a receipt. I left the check with Mr. Smith, and at Mr. Smith's request I said I would return the policy.

It was stipulated between counsel that at the time of these conferences between Mr. Dobbins and Mr. L. C. Smith, Mr. Smith was the attorney for Amos Halcomb, as administrator of the estate of George R. Halcomb, deceased.

Questions by the Court:

The first time I called on Mr. Smith was approximately July 15th, and the death occurred on July 7th. On my first visit the papers for the death claim were not completed, and Mr. Smith was not authorized to complete the papers, but he had to see the father of the deceased George Halcomb to have the papers completed, and my call on July 15th was for the purpose of completing the claim papers. I judge I called again the middle of August, when Mr. Halcomb had been appointed administrator of the estate, the first time he was authorized to complete these papers. It may have [98] been the last of August when I called to get the completed claim papers. I called again on the 8th of September, and offered a company check in payment of the contract, which was a certified check for $1,929.20, which was the full amount on the single indemnity provision of the policy.

The defendant offered in evidence the certified check payable to Amos Halcomb, administrator of

(Testimony of C. H. Dobbins.)

George R. Halcomb, deceased, which was admitted in evidence and marked Defendant's Exhibit No. 5.

The Court continued to question the witness.

When I called on Mr. Smith to deliver said check there was quite a long discussion between us about the double indemnity provisions of the policy. The check was left with Mr. Smith after said discussion, and he had asked me to return the policy. I did not have the policy with me at that time; it was in the head office at San Francisco. The check was left with Mr. Smith until I returned with the policy, some time in the middle of the week following, approximately September 15th, and I got the check back when I gave Mr. Smith the policy. The policy is a contract which must be surrendered to the company before payment will be made.

The plaintiff did not at first claim double indemnity. When the first payment was made out, there was nothing submitted to the company so far as evidence is concerned, of a fare paying passenger upon which they had a claim for double indemnity. There were two or three discussions had with Mr. Smith. The first discussion that I had with Mr. Smith was over who was to be the administrator of the estate so that I could complete the claim papers. I tendered the certified check to Mr. Smith and he refused to accept it, but he retained the check until I could return the [99] policy to him.

The defendant rests.

(Testimony of C. H. Dobbins.)

The plaintiff then interposed a motion for a directed verdict on behalf of the plaintiff with the reservation that if the motion was denied, then the case be permitted to go to the jury, which motion was denied by the Court, and exceptions noted. The defendant then interposed a motion for a directed verdict on behalf of the defendant with like reservation, which said motion for a directed verdict in favor of the defendant was denied, and exceptions noted.

The Court then announced that it would cause to be submitted to the jury, by way of special issue or verdict, the only question of fact in the cause, to-wit, "Was there an implied contract between the pilot Ollie A. Rose and George R. Halcomb for the payment of a fare? Yes or no."

Thereupon the case was argued by the respective counsel, and the Court proceeded to instruct the jury. Thereupon the defendant in open court, then and there requested the Court to instruct the jury as follows:

DEFENDANT'S PROPOSED INSTRUCTION NO. 1.

You are hereby directed to render your verdict in favor of the plaintiff, Amos Halcomb, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, deceased, and against the defendant, Metropolitan Life Insurance Company, a corporation, in the sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20), and no more.

If the foregoing instruction is refused, the defendant, Metropolitan Life Insurance Company, hereby requests the Court to give the following alternative instructions: [100]

DEFENDANT'S PROPOSED INSTRUCTION NO. 2.

The jury is instructed that in civil cases the affirmative of the issue must be proved, and where the evidence is contradictory, the decision must be made according to the preponderance of the evidence.

C. C. P. 1835.

DEFENDANT'S PROPOSED INSTRUCTION NO. 3.

The plaintiff sets forth in his complaint that the defendant, on the 13th day of April, 1928, issued its policy of life insurance to George R. Halcomb, wherein the defendant agreed that upon receipt of due proof of death of said George R. Halcomb, and upon the surrender of said policy, it would pay to the beneficiary of said George R. Halcomb, to-wit, the Administrator of the Estate of George R. Halcomb, deceased, the sum of Two Thousand Dollars ($2,000.00), and that said policy of insurance also provided that, upon receipt of due proof of death of said George R. Halcomb as a result of bodily injuries sustained while riding in an aeroplane as a fare paying passenger, the defendant agreed to pay, in addition to the Two Thousand Dollars ($2,000.00)

hereinabove mentioned, an additional sum of Two Thousand Dollars ($2,000.000). The complaint alleges that on or about the 7th day of July, 1932, said George R. Halcomb died from injuries sustained while riding in an aeroplane as a fare paying passenger, and said plaintiff, as Administrator of said decedent, seeks by his said complaint the recovery of the sum of Four Thousand Dollars ($4,000.00). The answer of the defendant admits the execution of the policy and admits its obligation to pay to the Administrator of the Estate of said decedent, the sum of Two Thousand and Eight and 29/100ths Dollars ($2,008.29), including accrued dividends on said policy and interest to date of the tender [101] of payment of principal indemnity, less, however, the sum of Seventy-nine and 09/100ths Dollars ($79.09), which said sum is averred to be the principal and interest of the indebtedness due, owing and unpaid by the said insured to the defendant pursuant to the terms of said policy of insurance, or the sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20), and it is denied by said answer that said decedent died as a result of bodily injuries sustained while riding in an aeroplane as a fare paying passenger, and said answer further denies all liability under and pursuant to the double liability provision of said policy.

The plaintiff and the defendant concede that the sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20) is the amount owing

by defendant to plaintiff upon the single liability provisions of said policy, and therefore, by said admissions of the parties, the plaintiff, in any event, is entitled to a verdict at your hands in the sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20), and you are further instructed that there is but one question or issue to be decided by you, and that is, whether or not said plaintiff is entitled to recover from the defendant the additional sum of Two Thousand Dollars ($2,000.00) by and through the provision of said policy of life insurance wherein the defendant agreed to pay to the beneficiary of said deceased insured said additional sum, upon due proof of the death of said insured as the result, directly and independently of all other causes, of bodily injuries sustained through external, violent and accidental means while riding in an aeroplane as a fare paying passenger; that all the instructions to be given by this Court to you will be directed solely to this issue and question last above stated. [102]

DEFENDANT'S PROPOSED INSTRUCTION NO. 4.

You are instructed that in the event you find that no fare was paid or agreed to be paid by said George R. Halcomb to Ollie A. Rose, the pilot and owner of the aeroplane in question, in consideration of the said transportation of said George R. Halcomb in said aeroplane, then and in that event, I direct you that the plaintiff is not entitled to re-

cover under and pursuant to the double indemnity clause set forth in said policy of life insurance and that you must return your verdict in favor of the plaintiff and against the defendant in the sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20), and no more.

DEFENDANT'S PROPOSED INSTRUCTION NO. 5.

The testimony and evidence in this case establishes that Ollie A. Rose, the pilot of the aeroplane in which George R. Halcomb was killed, was possessed of a private pilot's license at the time of the accident which resulted in the death of said George R. Halcomb, and that, as such private pilot, said Ollie A. Rose was prohibited by the law of the United States of America and the State of California from carrying persons or property for hire. You are instructed that the law presumes, in the absence of evidence to the contrary, that a person is innocent of wrong and that the ordinary course of business has been followed and that the law has been obeyed. Therefore, in the absence of evidence to the contrary, it is presumed that said Ollie A. Rose obeyed the air commerce regulations of the United States Department of Commerce and did not accept compensation for the aeroplane flight on which George R. Halcomb was killed, and therefore George R. Halcomb was not a fare paying passenger. [103]

DEFENDANT'S PROPOSED INSTRUCTION NO. 6.

The Court instructs the jury that, as a matter of law, in this case there is no burden on the defendant to disprove the allegations of plaintiff's complaint; that the burden of proving such allegations rests upon the party alleging the same, and in this case the burden rests upon plaintiff to establish his case and to prove all the allegations of the complaint (except those allegations admitted by the answer) by a preponderance of the evidence, and if you find that the weight of the evidence bearing on the whole case is in favor of the defendant, or that it is evenly balanced, then the plaintiff can recover a verdict at your hands in the sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20), and no more, which is the amount the defendant admits is due and payable to plaintiff under the terms of said policy.

DEFENDANT'S PROPOSED INSTRUCTION NO. 7.

The plaintiff sets forth in his complaint that George R. Halcomb was a fare paying passenger in an aeroplane at the time he sustained the injuries which resulted in his death. The defendant, Metropolitan Life Insurance Company, denies that George R. Halcomb was a fare paying passenger in an aeroplane at the time he sustained the injuries which resulted in his death. The plaintiff having the affirmative of this issue, it becomes necessary for him

to prove his allegation by a preponderance of the evidence, in order to entitle him to a verdict at your hands in excess of said sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20), and you will render your verdict for the plaintiff in the sum of Nineteen Hundred Twenty-nine and 20/100ths Dollars ($1,929.20), and no more, unless from a consideration of all of the evidence bearing [104] on the matter you shall be convinced by a preponderance of the evidence that, at the time of the aeroplane accident in which said George R. Halcomb sustained the injuries which resulted in his death, said decedent was riding therein as a fare paying passenger.

DEFENDANT'S PROPOSED INSTRUCTION NO. 8.

You are hereby instructed that you cannot infer in this case that the decedent George R. Halcomb paid fare to Ollie A. Rose, for the aeroplane flight involved in this case, from the fact that the said Ollie A. Rose on a prior occasion violated the law which prohibited him from accepting fare or compensation from any person for conveying him in his aeroplane, or, in other words, the fact that the said Rose may have accepted fare or compensation on another occasion, which he had no legal right to do, will not justify any inference that he collected fare or compensation from the said George R. Halcomb for the flight in question. To the contrary, I hereby instruct you that in the event you find that

there is an absence of evidence as to whether a fare was charged or paid by Halcomb to Rose for said transportation in the aeroplane in question, it must be presumed by you that said Ollie A. Rose obeyed the law and did not accept compensation for the aeroplane flight on which the said George R. Halcomb was killed.

Thereupon the plaintiff in open court, then and there requested the Court to instruct the jury as follows:

PLAINTIFF'S INSTRUCTION NO. 1

You are instructed that when two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular [105] circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age and sex as follows:

If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived.

PLAINTIFF'S INSTRUCTION NO. 2

You are instructed that the law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of

proof which produces conviction in an unprejudiced mind.

PLAINTIFF'S INSTRUCTION NO. 3

Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred.

PLAINTIFF'S INSTRUCTION NO. 4

Indirect evidence is of two kinds: Inferences; and Presumptions:

An inference is a deduction which the reason of the jury makes from the facts proved without an express direction of law to that effect.

A presumption is a deduction which the law expressly directs to be made from particular facts. [106]

PLAINTIFF'S INSTRUCTION NO. 5

An inference must be founded:

1. On a fact legally proved; and,

2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.

PLAINTIFF'S INSTRUCTION NO. 6

The law does not require in all cases direct evidence of a fact in dispute. The law recognizes the force of direct evidence which tends to establish such fact by proving another, which though not in itself conclusive, affords an inference or presumption of the existence of the fact in dispute.

Presumptive or circumstantial evidence is admissible in civil cases. When direct evidence cannot be produced, the minds will form their judgments on circumstances.

So, in this case it is not necessary that the plaintiff produce direct evidence that the deceased was a fare paying passenger as alleged in the complaint, but such fact may be inferred from all of the circumstances in the case.

PLAINTIFF'S INSTRUCTION NO. 7

You are instructed that the law presumes that the ordinary course of business has been followed.

This is a disputable presumption and may be controverted on other evidence.

PLAINTIFF'S INSTRUCTION NO. 8

You are instructed that evidence may be given as to any fact from which the facts in issue may be presumed or are logically inferable. [107]

PLAINTIFF'S INSTRUCTION NO. 9

You are instructed as to whether there was an implied contract that the deceased was to pay fare for the use of the airplane may be inferred from the circumstances attending the transaction.

PLAINTIFF'S INSTRUCTION NO. 10

You are instructed that where one performs services for another at the other's special instance and request and there is no agreement with respect to compensation, the law will imply an agreement to pay what the services are reasonably worth.

The making of an agreement may be inferred by proof of conduct, as well as by proof of the use of words.

PLAINTIFF'S INSTRUCTION NO. 11

You are instructed that where one performs for another with the other's knowledge. a useful service of a character usually charged for, and the latter expresses no dissent or avails himself of the service, a promise to pay the reasonable value of the service is implied.

And thereupon the Court instructed the jury as follows:

INSTRUCTIONS OF THE COURT TO THE JURY

It now becomes the duty of the Court to instruct the jury on the law of this case, and it becomes the duty of the jury to apply the law thus given to them, to the facts before them. [108]

The jury are the sole judges of the facts—It is the duty of the jury to give uniform consideration to all the instructions herein given, to consider the whole of the evidence and not a part thereof, to-

gether, and to accept such instructions as a correct statement of the law involved.

In civil cases the affirmative of the issues must be proved; the affirmative here is upon the plaintiff, and upon the plaintiff therefore, rests the burden of proof. You are the exclusive judges of the weight and sufficiency of evidence. Evidence is satisfactory which ordinarily produces a moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. When the evidence in your judgment is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your judgment should be against the party upon whom rests the burden of proof.

You are to decide this case upon the evidence adduced, subject to the instructions of the court, and upon the evidence alone, which means in part you are not swayed by sympathy; it means you will not be warranted in using sympathy for the purpose to put a strained construction either on the facts or the law; you should not be prejudiced, of course, to any extent, and I know you will not be against the defendant because it is a corporation. All persons, including corporations, insurance corporations are entitled to exact justice. The plaintiff sets forth in his complaint that the defendant on or about the thirteenth day of April, 1928, issued its policy of life insurance to George R. Halcomb, wherein the defendant agreed that upon receipt of due proof of death of the said George R. Halcomb, and upon the surrender of said policy, it would pay to the beneficiary of George R. Halcomb, [109] the

sum of Two Thousand Dollars; and that said policy of insurance also provided that upon the receipt of due proof of death of the said George R. Halcomb as a result of bodily injuries sustained while riding in an aeroplane as a fare paying passenger, the defendant agreed to pay in addition, two thousand dollars.

The answer of the defendant admits the execution of the policy and admits its obligation to pay to the administrator of the estate of the said decedent, the sum of $2008.29, less a certain amount with which we are not here concerned.

The plaintiff and the defendant concedes that the sum of approximately $1929.20 is the amount owing by the defendant to the plaintiff upon the single liability provisions of said policy; therefore by said admissions of the parties, plaintiff is entitled to judgment for that amount.

You are further instructed that there is but one question or issue to be decided by you, and that is whether or not said plaintiff is entitled to recover, and that is the fact whether or not said plaintiff is entitled to recover from the defendant the additional sum of Two thousand dollars by and through the provision of said policy wherein defendant agreed to pay the beneficiary of said decedent said additional sum upon due proof of death of said decedent of said insured by accidental means while riding in an aeroplane as a fare paying passenger.

You are also instructed all instructions to be given by the court are to be directed solely to this issue in question.

The evidence in this case establishes that Ollie A. Rose, the pilot of the aeroplane in which George R. Halcomb was killed, was possessed of a private pilot's license at the time of the accident which resulted in the death of said George R. Halcomb, [110] and that such pilot, Ollie A. Rose was prohibited by the laws of the United States of America, and the State of California from carrying persons or property for hire.

You are instructed that the law presumes in the absence of evidence to the contrary, that a person is innocent of wrong, and that the ordinary course of business has been followed, and that the law has been obeyed. This presumption is to be considered with all the other evidence in the case, to determine whether or not George R. Halcomb was a far paying passenger in the wrecked aeroplane.

Indirect evidence is of two kinds; inferences; and presumptions. An inference is a deduction which the reasoning of the jury makes from the facts proved, without an express direction of law to that effect. A presumption is a deduction which the law expressly directs to be made upon the particular facts.

A contract may be made either by express agreement, or by implication. An implied contract arises when one party renders services in expectation of remuneration, and the other party knowing of such expectation, receives the benefits of the services. In such cases the law implies a promise on the part of him who receives the benefit, to pay for the same.

Presumptive or circumstantial evidence is admissible in civil cases. In this case it is not necessary that the plaintiff produce direct evidence that the deceased was a fare paying passenger, as alleged in the complaint, but such fact may be inferred from all the circumstances in the case.

The only question for you gentlemen of the jury is to decide whether or not George R. Halcomb, the deceased, was a passenger for hire on the aeroplane, the destruction of which caused his death—there is no direct evidence upon this question—[111] the evidence on this subject on which you must draw your conclusion is brief. Mrs. Rose, the pilot's wife, heard all the conversation between Halcomb and her husband with reference to the flight to go and look for Halcomb's brother who was lost. Nothing was said about pay—she said her husband had carried virtually hundreds of passengers without pay, and she never knew her husband before accepting pay for taking up passengers. In this connection you may consider also the fact that Rose was not a licensed transport pilot, although the presumption is he did not take up passengers for hire in violation of the regulations of the Department of Commerce. The evidence relied on by plaintiff is that upon one occasion the pilot had taken up the deceased and a younger brother for five minutes and had charged three dollars for it; that about two weeks after this occasion, and two and a half months before the accident, the deceased and other members of his family went up for a flight in the plane owned by the Rose Brothers and paid a fee for it; the pilot in this case

was a licensed transport pilot employed by Rose Brothers. This was known as the three generations flight. There is no evidence that the deceased knew that Rose had no right to take up passengers for hire. From these facts and circumstances you must decide whether or not there was an implied contract that the deceased would pay Rose for taking him up in the plane to search for his brother.

It is for you gentlemen of the jury to say, from all the evidence in this case, whether there was an implied contract that the deceased was to pay a fare for the use of the plane.

The parties in this action have agreed upon what we call a special verdict; therefore if you find that there was an implied contract for hire, you should answer the special verdict "Yes;" if [112] you find there was no such contract, you should answer the special verdict "No." The special verdict reads, in part: "Was there an implied contract between the pilot, Ollie A. Rose and George R. Halcomb for the payment of fare?" then the answer yes or no, then a space left for that purpose. Your first duty will be to select a foreman, and you are probably aware of the fact in the Federal Court even in civil cases the verdict of the jury must be unanimous. I have already said your first duty will be to select a foreman. Any exceptions to the instructions?

Mr. HUSTON: We have none, your Honor.

Mr. WULFF: For the record, I would like to except to the Court refusing to give the following instruction of the defendant, and I would like to

ask, of course, that the proposed instruction be filed.

The COURT: (After reading instructions to jury:) Any exceptions to the instructions?

Mr. SMITH: We have none, your Honor.

Mr. WULFF: For the purpose of the record, I would like to except to the Court refusing to give the following instructions the defendant proposed, —I would like to ask that the proposed instructions be filed.

The COURT: I think that is the usual way.

Mr. WULFF: Then the proposed instructions are filed as part of the record in this case?

The COURT: Yes.

Mr. WULFF: Defendant's Proposed Instruction No. 4.—

Mr. HUSTON: Interposing: They are not numbered.

Mr. WULFF: No. 4 on the list.

The COURT: I think, Mr. Huston, that is really covered by the last instruction I gave,—Yes, 4. [113]

Mr. WULFF: That to the instruction proposed by defendant, No. 5, as altered by the Court, by inserting the language to the effect that the presumption of innocence from all legal wrong must be considered with all the other evidence and circumstances in the case,—To that addition I enter my exception.

The COURT: I may say in passing, that is the law in the State courts, but I think it is not the law in the Federal courts; but, you have made your ob-

jection specifically in that case, and you have the benefit of the objection.

Mr. WULFF: And to defendant's proposed instruction No. 6, and defendant's proposed instruction No. 8, on the ground we have these exceptions, being that the instructions are in accordance with the law and applicable under the facts of this case. Now, I would also like to except to the instructions given by the Court, and prepared and proposed by the plaintiff; and for convenience, I will refer to the numbers of the plaintiff's proposed instructions. Instruction No. 2, proposed by the plaintiff in reference to,—No, I withdraw that, please,—My error.

The COURT: And, Instruction No. 3 was refused.

Mr. WULFF: Plaintiff's instruction No. 4 was what I had in mind; on the ground that this instruction does not apply here, the only inference to be drawn,—the only facts rather upon which inferences are drawn, are subject to two conflicting inferences.

The COURT: No. 5 was refused.

Mr. WULFF: And, plaintiff's instruction No. 6, I believe, was given in part; and defendant excepts to the part given.

The COURT: No. 7 was refused,—No. 8 was refused.

Mr. WULFF: Just to make my record here, if your Honor please, we except on the ground the instruction does not state the law, when direct evidence is introduced on a fact in dispute. [114]

The COURT: 7 and 8 were refused; 9 was given as modified.

Mr. WULFF: Yes; we would like to except at this time to plaintiff's instruction No. 9, was modified by the Court, on the general ground no implied contract is shown, and evidence is applicable in a case where an illegal contract is involved.

Thereupon the jury retired to consider their special verdict, and returned a special verdict as follows:

> "Was there an implied contract between the pilot Ollie A. Rose and George R. Halcomb, for the payment of fare? Yes."

which said verdict was returned on October 4, 1933.

Thereupon the case was argued upon the questions of law, to-wit: Whether or not George R. Halcomb was a fare paying passenger in the aeroplane transportation in question, and further, in view of the fact that Ollie A. Rose was prohibited by law from transporting passengers for hire or a fare, could there have been under the law an expressed or implied contract between Ollie A. Rose and George R. Halcomb for the payment of a fare. After due argument, the case was submitted to the Court for decision.

CONCLUSION.

And now in furtherance of justice, and that right be done, defendant tenders the foregoing as its bill

of exceptions in this case to the action of the Court, and prays that the same be settled, allowed and signed by the Court.

DATED, June 30, 1934.

DEVLIN & DEVLIN & DIEPENBROCK
HORACE B. WULFF
Attorneys for Defendant. [115]

It is hereby stipulated that the above and foregoing bill of exceptions is a correct statement of the evidence adduced at the trial and proceedings had before the Court, and that the same may be approved, allowed and settled by the trial Judge as the bill of exceptions in the above entitled matter, without further notice to any party hereto, and that when so approved may be engrossed and filed in the Clerk's office and become a part of the record for the purpose of the appeal in this cause taken by the Metropolitan Life Insurance Company, a corporation, defendant.

DATED, June 30, 1934.

ARTHUR C. HUSTON
L. C. SMITH
Attorneys for Plaintiff.

I hereby certify that the foregoing bill of exceptions contains all the evidence, with the exception of the exhibits, all the instructions given by the Court, all the instructions proposed by the defendant, objections, rulings, exceptions and all proceedings at the trial and is full, true and correct, and is hereby settled and allowed, and the same has been

proposed, served and presented and certified within the time allowd by law.

DATED, July 18th, 1934.

FRANK H. KERRIGAN
Judge.

[Endorsed]: Filed Jul. 26, 1934. Walter B. Maling, Clerk. [116]

[Title of Court and Cause.]

STIPULATION FOR TRANSMITTAL OF EXHIBITS.

It is hereby stipulated by and between the parties hereto that all exhibits introduced at the trial of the above entitled cause, to-wit:

1. Plaintiff's exhibit No. 1, sample form of ticket used by Rose Air Service;

2. Plaintiff's Exhibit No. 2, original policy issued by the Metropolitan Life Insurance Company to George R. Halcomb, insured;

3. Defendant's exhibit No. , the Air Commerce Regulations of the Department of Commerce, effective December 31, 1926, as amended;

4. Defendant's Exhibit No. 3, private pilot's license issued to Ollie Rose, dated March 7, 1931;

5. Defendant's Exhibit No. 4, loan certificate and assignment of policy;

6. Defendant's Exhibit No. 5, certified check in the amount of One Thousand, Nine Hundred Twenty-nine and 20/100ths Dollars ($1,929.20);

may be transmitted by the Clerk of said United States District Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of transcribing and inserting said exhibits in full in the bill of exceptions.

It is further stipulated that an order of Court ordering the transmittal of said exhibits to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit may be made pursuant hereto.

Dated, June 30th, 1934. [117]

ARTHUR C. HUSTON
L. C. SMITH
Attorneys for Plaintiff.
DEVLIN & DEVLIN & DIEPENBROCK
HORACE B. WULFF
Attorneys for Defendant.

[Endorsed]: Filed Jul. 26, 1934. Walter B. Maling, Clerk. [118]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record in the above entitled action, to be filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and to include the following:

1. Record on removal from the State Court to the Federal Court.

2. Notice of removal.

3. Amended answer.
4. Special verdict.
5. Memorandum opinion.
6. Judgment.
7. Motion for new trial.
8. Order denying motion for new trial.
9. Petition for appeal.
10. Assignment of Errors.
11. Order allowing appeal.
12. Bond on appeal.
13. Bill of exceptions.
14. Stipulation transmitting original exhibits.
15. Praecipe for transcript of record.

Said transcript to be prepared as required by law and the rules of the United States Supreme Court and the United States Circuit Court of Appeals for the Ninth Circuit, and thereafter to be transmitted to said Circuit Court of Appeals for the Ninth Circuit, together with the original citation on appeal.

Dated, June 6, 1934.

DEVLIN & DEVLIN & DIEPENBROCK
HORACE B. WULFF
Attorneys for Defendant and Appellant.

[Endorsed]: Filed Jun. 6, 1934. Walter B. Maling, Clerk. [119]

Due and personal service hereof by copy admitted this 7th day of June, 1934.

L. C. SMITH

HUSTON, HUSTON & HUSTON by L. G.

Attorneys for Plaintiff.

[Endorsed]: Filed Jun. 12, 1934. Walter B. Maling, Clerk.

[Endorsed]: No. 7562. United States Circuit Court of Appeals for the Ninth Circuit. Metropolitan Life Insurance Company, a corporation, Appellant, vs. Amos Halcomb, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, deceased, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed August 3, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

2

No. 7562

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased,

Appellee.

BRIEF FOR APPELLANT.

DEVLIN & DEVLIN & DIEPENBROCK,
HORACE B. WULFF,
California State Life Building, Sacramento, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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No. 7562

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT.

This is an appeal by the Metropolitan Life Insurance Company, a corporation, defendant (appellant herein), from a judgment of the United States District Court, in and for the Northern Division, Northern District of California, in favor of the plaintiff, Amos Halcomb, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, deceased, in the sum of $4092.65, plus interest and costs.

Said judgment was entered pursuant to a verdict rendered by the jury at the trial of the action, wherein the plaintiff (appellee herein) sought to recover against the defendant (appellant herein) for an alleged breach in the performance of a policy of life insurance.

Metropolitan Life Insurance Company issued to George R. Halcomb its life insurance policy upon his life, in the principal sum of $2000.00, under date of April 13, 1928. Said policy provided for two types of indemnity payments; that is, the sum of $2000.00 to be paid to the administrator of the estate of said insured upon receipt of due proof of the death of the insured, and, secondly, the payment of the additional sum of $2000.00 under a double indemnity clause upon receipt of due proof of the death of the insured, "as the result, directly and independently of all other causes, of bodily injuries sustained through external, violent and accidental means, provided * * * (6) *that death shall not have resulted from bodily injuries sustained while participating in aviation or aeronautics except as a fare paying passenger,* * * *." (R. 27-28.) (Italics ours.)

George R. Halcomb died July 7, 1932 (R. 1) and the appellant has been at all times, and still is, ready and willing to pay the amount due under the single indemnity clause of said policy, and has tendered to the appellee the amount due, owing and payable thereunder, which said appellee has refused to accept. (R. 112.)

The sole question in the case is the right of the appellee to recover under the double indemnity clause hereinabove set forth.

George R. Halcomb met his death under the following facts and circumstances:

Ollie Rose owned two aeroplanes which he used in connection with his business of commercial aviation in the City of Redding, California. (R. 96.) Ollie Rose possessed a private pilot's license (R. 102, 111), as required by the Regulations of the Department of Commerce (Section 46, Subdivision (e) of Air Commerce Regulations), which license permitted him to operate a licensed aeroplane for the transportation of persons gratuitously, but not for hire. In the conduct of his commercial aviation business he employed a pilot, who possessed a transport pilot's license, for the purpose of operating aeroplanes carrying persons for hire. (R. 102.) Rose, to the knowledge of his wife, did not haul or carry passengers in aeroplanes for fare, but in all such transportation for hire the plane was operated by Lund, the transport pilot in the employ of Rose. (R. 102.)

On the 7th day of July, 1932, the brother of George R. Halcomb was lost in the woods in the vicinity of Redding for a period of time, and various unsuccessful searching parties had been organized for the purpose of locating said person. At about twenty minutes of two on the afternoon of July 7, 1932, said George Halcomb called at Rose's home, and Halcomb stated to Rose, in the presence of Mrs. Rose: "You know my brother is lost, and I came down to see if

you would take me up in the plane, I thought we might be able to see him up from the air". Rose replied: "Sure, I will do anything I can, anything under God's heaven I can do to help you, I am willing to do it". Rose then said: "When do you want to go, George?" To which Halcomb replied: "As soon as possible". It was then arranged by said parties to meet at the airport at two o'clock. (R. 101.) Halcomb then turned and went back to his automobile. Halcomb and Rose met at the air field and started the flight during which the aeroplane crashed, resulting in the death of both Halcomb and Rose. There were no other negotiations between Halcomb and Rose of and concerning that flight, other than above stated.

The question is whether, under the foregoing facts, there was an express or implied contract for the carriage of Halcomb on that flight for a fare, or, in other words, was Mr. Halcomb a "fare paying passenger" within the meaning of that phrase as set forth in said policy of life insurance.

The Air Commerce Act, Title 49 U. S. C. A., Section 181, provides that "it shall be unlawful, * * * to serve as an airman * * * without an airman certificate or in violation of the terms of any such certificate", and said section also provides for penalties, etc., for the violation of any of the Regulations of the Department of Commerce. The Air Commerce Act (Section 173 of 49 U. S. C. A.) also provides that the Regulations of the Department of Commerce shall have the force of law.

The State of California (1929 Statutes, pages 1874-1877) adopted the Air Commerce Regulations of the Department of Commerce as the law of the State of California, and it was therein provided that a violation thereof shall constitute a misdemeanor, punishable by fine or imprisonment.

The pilot Rose had a private pilot's license which entitled him to take up passengers as guests, but prohibited him from transporting passengers for a fare or consideration. (R. 110.) In view of the law hereinabove set forth, the question of law arose whether or not the decedent Halcomb was or could be a fare paying passenger in an aeroplane piloted by a pilot prohibited from transporting passengers for hire.

The defendant (appellant herein) made its motion for a nonsuit, which was denied, and later made its motion for a directed verdict, which was denied. The Court, in denying the same, held that if there was a contract by Rose to carry Halcomb as a passenger for a fare or for hire, such contract of carriage was illegal, being *malum prohibitum,* and therefore Rose could not have enforced the purported implied contract for the payment of a fare. But the Court further held that because the contract was "merely *malum prohibitum* it did not mean, however, that the contract itself may not be implied and may not in certain respects be enforceable". (R. 66.)

Based upon that holding said District Court submitted to the jury, in the form of a special verdict, the following:

> "Was there an implied contract between the pilot Ollie A. Rose and George R. Halcomb, for the payment of fare? (Answer 'Yes' or 'No'.)" (R. 64.)

The jury returned the said special verdict with a finding of "Yes".

The trial Court thereafter reserved for its ruling the question of law of whether or not a contract could be implied when the subject-matter thereof was illegal, which matter was argued and submitted upon briefs. Thereafter, the Court filed its memorandum opinion holding that the plaintiff is entitled to a judgment for $4092.65, with interest at 3½%, as provided in the policy, from the date of the death of the insured less the indebtedness due from said insured to said insurance company upon the policy, together with costs of suit. Judgment was entered in conformity with said special verdict of the jury and the opinion of said Court, from which judgment this appeal was perfected.

QUESTIONS INVOLVED.

1. Whether the deceased was a "fare paying passenger".

2. Whether a contract can be implied where the subject-matter thereof is illegal.

3. Whether a contract can be enforced where the subject-matter thereof is *malum prohibitum* and not *malum in se.*

4. Whether the Court erred in admitting the testimony of the witness, Daniel Franklin Halcomb, over the objection of the defendant, to the effect that his brother had some three months prior to his fatal flight paid Mr. Rose $3.00 for a flight in an aeroplane operated by Ollie Rose.

5. Whether the Court erred in refusing to charge the jury with the following instructions:

> "You are hereby instructed that you cannot infer in this case that the decedent George R. Halcomb paid fare to Ollie A. Rose, for the aeroplane flight involved in this case, from the fact that the said Ollie A. Rose on a prior occasion violated the law which prohibited him from accepting fare or compensation from any person for conveying him in his aeroplane, or, in other words, the fact that the said Rose may have accepted fare or compensation on another occasion, which he had no legal right to do, will not justify any inference that he collected fare or compensation from the said George R. Halcomb for the flight in question. To the contrary, I hereby instruct you that in the event you find that there is an absence of evidence as to whether a fare was charged or paid by Halcomb to Rose for said transportation in the aeroplane in question, it must be presumed by you that said Ollie A. Rose obeyed the law and did not accept compensation for the aeroplane flight on which the said George R. Halcomb was killed." (R. 83-84.)

6. Whether the Court erred in charging the jury as follows:

> "The evidence in this case establishes that Ollie A. Rose, the pilot of the aeroplane in which

George R. Halcomb was killed, was possessed of a private pilot's license at the time of the accident which resulted in the death of said George R. Halcomb, and that such pilot, Ollie A. Rose was prohibited by the laws of the United States of America, and the State of California from carrying persons or property for hire.

You are instructed that the law presumes in the absence of evidence to the contrary, that a person is innocent of wrong, and that the ordinary course of business has been followed, and that the law has been obeyed. This presumption is to be considered with all the other evidence in the case, to determine whether or not George R. Halcomb was a fare paying passenger in the wrecked aeroplane." (R. 84.)

"It is for you gentlemen of the jury to say, from all the evidence in this case, whether there was an implied contract that the deceased was to pay a fare for the use of the plane." (R. 85-86.)

I.

THE DECEASED WAS NOT A "FARE-PAYING PASSENGER".

The policy in question provides that the beneficiary is not entitled to the benefit of the double indemnity provision of said policy in the event that the death of the insured results "from bodily injuries sustained while participating in aviation or aeronautics *except as a fare paying passenger*".

The words "fare paying" as used in the policy, constitute a descriptive phrase defining the kind or class of passengers which the policy is intended to desig-

nate. The use of this language is to be construed in accordance with the rules applicable to the construction of contracts. Where there is no uncertainty or ambiguity in the language of the policy, there is no occasion for judicial construction, and the rights and liabilities of the parties must be determined in accordance with the plain, ordinary and popular uses of the language which they have used in their contracts.

Canton Ins. Office v. Independent Transp. Co., 217 Fed. 208, 214 (C. C. A. 9th);

Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452-463, 38 L. ed. 231.

Further, the intention of the parties at the time of entering into a contract is a determining factor. Therefore, from the language of the policy and the plain intention of the parties, was the insured, at the time of his death, a fare paying passenger?

The word "fare" means the rate of charge for the carriage of passengers (25 *C. J.* 670); money paid for voyage or passage. (Bouvier's Law Dictionary.) A charge is a fixed rate or demand for services rendered.

Fulmer v. Southern Ry. Co., 45 S. E. 196;

Clark v. Southern Ry. Co., 119 N. E. 539, at 542.

The word "fare" implies or is defined to be a fixed charge. It implies or should imply, not only the right to ride and pay for passage, but the right to carry and receive compensation for passage. There must be a contract on the part of the passenger to pay a fixed charge for passage, and on the part of the carrier to receive such compensation.

There is no evidence, and we understand it is conceded by appellee, that the insured made no contract to pay a fixed charge or fare to Ollie Rose, the owner and pilot of the aeroplane, for his said transportation. Nor was any fare paid by the insured or accepted by the pilot. This being true there can be no basis for a recovery by the plaintiff (appellee here) in this action.

The identical policy form involved in this action was likewise involved in *Padgett v. Metropolitan Life Insurance Company,* 173 S. E. 903 (North Carolina), where, also as here, the insured was riding as a passenger in an aeroplane operated by a pilot possessing merely a private pilot's license. The Metropolitan Life Insurance Company in the above cited case made the same contention that is made here, that is, that the plaintiff was not entitled to recover under the double indemnity clause on the ground that the death of the insured resulted from bodily injuries sustained by him while participating in aviation or aeronautics otherwise than as a fare paying passenger. In denying recovery to the plaintiff in that case, the Court said:

> "All the evidence tended to show that at the time he sustained his fatal injuries, the insured was participating in aviation or aeronautics. He was riding in an aeroplane, en route from Lincolnton, N. C., to Charlotte, N. C. There was no evidence tending to show that the insured was a fare-paying passenger. He was riding in the aeroplane with his employer, E. H. Byars Jr., who held a Private Pilot's License, issued to him by the United States Department of Commerce. *It was expressly provided in said license that the holder thereof was not authorized to transport*

persons or property, for hire. All the evidence showed that the insured was riding with his employer, upon the latter's invitation, and that no fare was paid or contemplated by either. There was no error in the judgment dismissing the action." (Italics ours.)

From the above cited rules of interpretation it must be assumed that the insurer had some sound reason for using the language "fare paying passenger", which must be interpreted as intended and according to its true meaning. The contract undertakes to cover any death resulting from violence as above described in the policy, but expressly provides that it does not cover death resulting from participation in aviation or aeronautics, except as a "fare paying passenger". The reason for this exclusion is because of the great dangers incident to promiscuous flying by and with those not properly experienced.

The insurer was willing however, to make an exception to the general exclusion clause in accidents occurring to a fare paying passenger, because of the comparative safety in travel by aeroplanes for hire, when regulated by the Government and the State, and operated by experienced pilots licensed by the Federal Government. It is a well known fact that this method of passage has become comparatively safe.

Surely the policy did not mean that any person who was not licensed to carry passengers for hire can take up a person, as in the instant case, and then such person successfully contend that he was a "fare paying passenger". If so, the language has no meaning and the purpose of the insurer in using it is in vain.

II.

A CONTRACT CANNOT BE IMPLIED WHERE THE SUBJECT-MATTER IS ILLEGAL.

From the foregoing evidence it is conceded and held by the Court (see opinion of Court, R. 63, *et seq.*) that there was no express contract between George Halcomb and Ollie Rose wherein and whereby Halcomb agreed to pay to Rose a fare for the transportation in the aeroplane in question. The evidence is further undisputed that Halcomb did not pay a fare, and that there was nothing in said negotiations for the aeroplane transportation about the payment of a fare.

The plaintiff can consequently recover only if there was an implied contract by Halcomb to pay a fare to Rose. The trial Court held, and properly so, that in the event Halcomb refused to pay a fare, Rose, the pilot, could not enforce the purported implied contract or in any manner legally obligate Halcomb to pay such a fare. (R. 66.)

When a contract is made by a party required by law to have a license before entering into such contract, such contractor cannot compel the other party to pay the purchase price in the event that such contractor does not possess the license required by law, and even though the contract has been fully performed by the seller. See:

William Stake & Co. v. Roth, 154 N. Y. S. 213;

Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759.

The question then remains whether or not the law will imply a contract when the parties cannot legally

make an express contract upon such subject-matter, or, in other words, will the law imply a contract which is contrary to law. The principle is well established that a contract will not be implied when the parties cannot legally make an express contract covering such subject-matter. This principle is well established in the State of California, and it suffices to cite the early and leading case on that question, to-wit, *Zottman v. San Francisco,* 20 Cal. 96, in which case the Court stated (p. 108):

> "The analogy drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here, neither the officers of the corporation nor the corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; and *the law never implies an obligation to do that which it forbids the party to agree to do.*" (Italics ours.)

The *Zottman Case, supra,* was approved by this Court in *City of Astoria v. American La France Fire Engine Co.,* 225 Fed. 21, at page 26, where this Court held that where an express contract covering the subject-matter of an implied contract is void, being prohibited by law, no contract can be implied, or, in other words, "the law never implies an obligation to do that which it forbids the party to agree to do".

In *Potter v. Florida Motor Lines,* 57 Fed. (2d) 313, at 316, the Court said:

> *"It is no answer to say that the contract is not one made by the parties, but is one implied by law. The law will not imply a contract where from the nature of the case the parties cannot legally make an express contract.* Simpson v. Bowden, 33 Me. 549. Bishop says: 'When the law lays on one a duty to another, it creates a promise from the former to the latter to discharge the duty. The limit of the doctrine is that where, from the nature of the case, not merely from inability of the party, there could not be a contract in fact, the law does not undertake to create the impossible.' Bishop on Contracts (2d Ed.) secs. 182-186." (Italics ours.)

Williams Stake & Co. v. Roth, 154 N. Y. S. 213, involved a case similar in facts and identical in principle to the case at bar. In said case there was involved a statute which prohibited any person from acting as a public insurance adjuster for hire or from receiving any money or compensation for services rendered without first procuring a certificate of authority to act as a public adjuster from the state, and the plaintiff in that case was employed by the defendant to adjust for the defendant a certain fire loss; and, further, the defendant solicited the plaintiff's services. The contract was silent as to any compensation to be paid for the plaintiff's services. The statute therein involved was analogous to the Air Commerce Regulations of the Department of Commerce herein involved, in that said statute prohibited a broker from acting as an adjuster for compensation for a client when the broker possessed no such license, but the law permitted such broker to adjust without compensation.

In reference to the right to imply a contract for the payment of services rendered under the principle of *quantum meruit,* the Court said (p. 215):

> *"Where the law expressly forbids a person to perform services for compensation, but expressly permits him to perform them without compensation, then the law can certainly not imply a promise to pay compensation for such services. There was, consequently, no implied promise to pay for any services performed at the request of the defendants made on January 2d, * * *."* (Italics ours.)

In view of the fact that the negotiations between Halcomb and Rose were entirely silent upon the question of the payment of compensation for the flight, and in view of the fact that Rose under a private pilot's license could legally transport Halcomb *without compensation,* the law cannot imply a promise to pay compensation for such service. To the contrary, the law must imply that the contract, if any, between the parties was a legal contract, that is, an agreement for transportation without compensation.

The law is a part of and enters into every contract, and is included in the terms thereof as fully as if the law were expressly referred to and incorporated in its terms.

In *Burke v. Meyerstein,* 94 Cal. App. 349, the Court, on page 353, stated:

> "Parties are presumed to have contracted with reference to laws in existence at the time the contract was made; and when a law affects the *validity,* construction, discharge, or enforcement

> of the contract *it enters into and forms a part of it,* measuring the obligations of one party and the rights acquired by the other (citing cases)." (Italics ours.)

In *General Paint Corporation v. Seymour,* 124 Cal. App. 611, 12 Pac. (2d Series) 990, the principle applicable in this case is declared to be as follows:

> "The law formed part of the contract, and it must be presumed that the parties contracted with knowledge of that fact."

In *Bobzein v. New York Central R. Co.,* 176 N. Y. S. 407, quoting from page 410, it was said:

> "The shipment was one in interstate commerce, and the provisions of the Interstate Commerce Act are to be read into the contract of transportation."

In the case last quoted, the bill of lading was silent as to the obligation of the carrier to provide the icing for the carload of peaches involved. The Court held that inasmuch as the Interstate Commerce Act, that is, the Carmack Amendment thereto, provided that the initial carrier should be liable for transportation, that it is liable for the icing as a part of the contract of shipment.

Since neither under the Federal law nor the State law there could be a fare paying passenger except in an aeroplane operated by an operator licensed to carry passengers for fare, the language in the policy, to-wit, "a fare paying passenger", must be read with regard to the law and to the same extent as if the provisions of the law above referred to were inserted

in the policy. In other words, the expression, "a fare paying passenger", as used in the policy, necessarily means that to constitute such, such passenger must be in an aeroplane which is operated by a pilot who is authorized by law to carry passengers for hire.

In *Northern P. R. Co. v. Wall,* 241 U. S. 87, 60 L. ed. 905, 907, it is held:

> "As this court often has held, the law in force at the time and place of the making of a contract, and which affect its validity, performance, and enforcement, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

If such was not the law, then the provision of the double indemnity clause of the policy involved herein would have no purpose, for the payment of a fare by itself does not decrease or lighten the risk covered by the single indemnity provision. On the contrary, flying with a pilot who is authorized and permitted by law to collect a fare certainly covers a slighter risk than riding with a pilot who holds no such transport license. The law points the reason for the language of the double indemnity provision of the policy and not the mere fact of the paying of a fare.

In conclusion, upon this point, it is clear that the plaintiff's intestate was not a fare paying passenger, either in fact or in law, and therefore the relationship, upon which the right to collect under the double indemnity clause must be premised, was never created, to-wit, that of a fare paying passenger.

III.

A CONTRACT MALUM PROHIBITUM CANNOT BE ENFORCED IRRESPECTIVE OF WHETHER ONE OF THE PARTIES TO SUCH CONTRACT WAS NOT IN PARI DELICTO.

Conceding for the purpose of argument only that Halcomb intended to pay a fare or consideration for said aeroplane excursion, still there would not be thereby created a valid and legal contract of transportation under which the relationship of passenger and carrier could be created. In order for a person to be a fare paying passenger, it is necessary that there be a contract of carriage, which contract should have all of the elements necessary for a legal contract.

Section 1550 of the Civil Code of the State of California provides:

> "It is essential to the existence of a contract that there should be:
>
> 1. Parties capable of contracting;
> 2. Their consent;
> 3. *A lawful object;* and,
> 4. A sufficient cause or consideration."

The purported contract of carriage in the case at bar was not between parties capable of contracting nor did it have a lawful object. The Act of Congress of May 20, 1926 (Title 49, U. S. C. A., page 24 of the 1923 Cumulative Annual Pocket Supplement) directs the Secretary of Commerce to make certain regulations in reference to the registration of aircraft, and also in reference to the issuance, suspension and

revocation of certificates for the operation of aircraft. Pursuant to said direction, the Secretary of Commerce has made certain regulations, copies of which were introduced in evidence. (R. 109-110.) Particular reference is made to Subdivision (e) of Section 46 of said Air Commerce Regulations, which provides:

> "Private pilots * * * shall not carry persons or property for hire in licensed or unlicensed aircraft."

The said Air Commerce Act of 1926 (Title 49, U. S. C. A., pages 29 and 30 of the 1932 Cumulative Annual Pocket Supplement) provides:

> "It shall be unlawful * * *
>
> (4) To serve as an airman in connection with any aircraft registered as an aircraft of the United States, or any foreign aircraft, without an airman certificate or in violation of the terms of any such certificate."

As a penalty for such violation, Subdivision (b) of said Act of Congress provides that a person violating said section shall be subject to a penalty of $500.00.

The State of California has adopted all Federal laws and regulations for the licensing of aircraft, airmen and air navigation facilities. (See Chapter 850, Statutes of California for 1929, pages 1874 to 1877, both inclusive.) Said statute of the State of California, in part, provides:

> "Sec. 5. * * * it shall be unlawful for any person to act as an airman in any capacity, except

that for which he is licensed under the laws of the United States or any regulations adopted pursuant thereto.

Sec. 6. The certificate of the licensee, required by section 5 of this act, shall be kept in the personal possession of the licensee when he is operating aircraft within this state and must be presented for inspection upon the demand of any passenger, * * *.

Sec. 8. Any person, firm, association or corporation violating any of the provisions of this act, which violation is not herein declared to be a felony, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or be subject to both such fine and imprisonment."

Ollie A. Rose, as a private pilot, pursuant to the laws and regulations above set forth, was prohibited from operating or piloting an aeroplane for the carriage of passengers or property for hire. Therefore, the subject-matter of the contract implied by the verdict of the jury and the judgment of the Court covered a subject-matter prohibited by both the Federal and State laws.

It is true that the subject-matter of such contract was *malum prohibitum* and not *malum in se*. The District Court, in its opinion, held that a contract *malum prohibitum* confers certain rights and for certain purposes has a legal existence, and in support of that holding cites two California cases involving

the sale of securities which were made in violation of the provisions of the California Corporate Securities Act (Blue Sky Law). The cases cited are:

Hemmeon v. Amalgamated Copper Mines Co., 95 Cal. App. 400;

Becker v. Stineman, 115 Cal. App. 740.

These cases do not hold that contracts for the purchase of securities in violation of the Blue Sky Law are enforceable in favor of the innocent party, but, to the contrary, they hold that such contracts are void for all purposes and utterly unenforceable by Courts of law or of equity. But said cases do hold that the innocent party to said contract may recover from the party violating the statute, all considerations or things of value that he has paid or performed under said void contract, in an action based upon *quantum meruit* or *quasi*-contractual principles. An action based upon *quantum meruit* is not an action upon a contract, but it is independent entirely of the contract.

In the case of *Hemmeon v. Amalgamated Copper Mines Co., supra,* the District Court of Appeal adopted and quoted from *Smith v. Bach,* 183 Cal. 259. In the last mentioned case the Court clearly holds that contracts *malum prohibitum* are void and that it is immaterial whether the thing forbidden is *malum in se* or *malum prohibitum.* In that regard the Court said, on page 262:

> "The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the

statute does not expressly pronounce it so, and *it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum.* A statute of this character prohibiting the making of contracts, except in a certain manner, *ipso facto* makes them void if made in any other way. (13 Cyc. 351; 13 Corpus Juris., p. 410.) The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void. This general rule finds support in the decisions of this state. (*Berka v. Woodward,* 125 Cal. 127 (73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777), and cases cited; *Bentley v. Hurlburt,* supra.)" (Italics ours.)

The Court in said case further held that the purchaser under such illegal contract, if he is not *in pari delicto,* may recover the *consideration paid under such illegal contract not upon the basis of enforcing the illegal contract,* but, on the contrary, on the basis that a contract is implied by operation of law under the theory of *quasi*-contracts to prevent the party *in pari delicto* from becoming unjustly enriched.

In other words, to permit the purchaser of stock in violation of the Blue Sky Law to recover the purchase price paid does not require an enforcement of a void or illegal contract, but, to the contrary, it is necessary, first, that the contract be declared void and illegal, and being void, the innocent party is then entitled to recover what he paid thereon to prevent the guilty party from becoming unjustly enriched or to permit him to profit by his own wrong.

This question has been before the Supreme Court of the State of California in a later case, to-wit, *Pollak v. Staunton,* 210 Cal. 656, wherein the Court held, at page 662:

> "Where stock has been issued without a permit it is void by the terms of the act (sec. 12), and the purchaser who is ignorant of such unauthorized issue may recover payments made by him on account of the purchase price. (Citing cases.) *An action for money had and received is an appropriate proceeding in which to obtain relief.* (Citing cases.)" (Italics ours.)

On page 665 said Court states that the recovery of the purchase price so paid by such innocent purchaser does not require such innocent party to enforce an illegal transaction, but that recovery is based upon *quasi*-contractual principles. In that connection, the Court said:

> "The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received."

Said Court, on page 663, further said in this respect:

> "Plaintiff could not by his conduct ratify or impart validity to the void contract and void stock. As said by the court in *Reno v. American Ice Machine Co.*, 72 Cal. App. 409 (237 Pac. 784): *'Such a contract has no legal existence for any purpose and neither action nor inaction of*

a party to it can validate it and no conduct of a party to it can be invoked as estoppel against asserting its invalidity'." (Italics ours.)

In *Tatterson v. Kehrlein,* 88 Cal. App. 34, it was held that a statute of this character prohibiting the making of contracts, except in a certain manner, *ipso facto* makes them void if made in any other way, and it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum,* and, further, that such illegal contracts could not be enforced irrespective of the conduct or ratification of the innocent party. On page 49, the Court, in this respect, said:

> "'The doctrines of estoppel by conduct and ratification have no application to a contract which is void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no legal existence for any purpose and neither action nor inaction of a party to it can validate it and no conduct of a party to it can be invoked as estoppel against asserting its invalidity.' (*Reno v. American Ice Machine Co., supra;* see, also, *Colby v. Title Ins. Co.,* 160 Cal. 632 (Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913); *MacRae v. Heath,* 60 Cal. App. 64, 72 (212 Pac. 228); *Reilly v. Clyne,* 27 Ariz. 432 (40 A. L. R. 1005, 234 Pac. 35, 39).)
>
> The penalties prescribed by the Corporate Securities Act being all laid on the seller and none on the buyer, and the statute being for the benefit and protection of buyers, the parties are not *in pari delicto,* and the buyer may have judgment for the money paid out by him under the illegal

> contract, and may have the contract, the stock certificates and promissory note given in payment of such stock canceled."

Reference is also made to *Walker v. Harbor Realty Corp.,* 214 Cal. 46, 48.

In citing and applying the rule enunciated in the *Hemmeon* and *Becker Cases*, the District Court appears to have totally overlooked the fundamental difference between the parties involved in those actions and the parties involved in the case at bar. In the two cases cited, the actions involve disputes *between the immediate parties to the allegedly illegal contract* which were brought to determine their respective rights *as between themselves* under such contract.

The case at bar is not one between such parties. The defendant was not a party to the illegal contract and had no knowledge of it. Nevertheless, the plaintiff is relying on the illegal agreement with Rose as her foundation for a claim against a party having no knowledge of or connection with the illegal agreement depended upon.

Whatever may be the respective rights or equities as between the immediate parties to such illegal agreement, it is difficult to understand how a valid claim against a third party can be founded on an illegal agreement with a totally different party. At most, all that these cases hold is that the *innocent party* to said contract may recover from the guilty party, and such recovery is limited to such consideration or things of value that the innocent party has paid or performed

under said void contract, *in an action based on quantum meruit or quasi-contractual principles.*

No question of an innocent or guilty party is involved in the present action. It does not involve a claim by an injured party against the other party to a transaction wherein the injured party was overreached. For these reasons the *Hemmeon* and *Becker Cases* are not binding nor do they enunciate the proper rule to be applied in this case.

In the case at bar the plaintiff is not seeking to recover upon *quasi*-contractual or unjust enrichment principles, but is seeking to premise a recovery upon the relationship of passenger created by a purported contract which is prohibited and forbidden by law. In other words, in order for appellee to succeed in the case at bar he must establish the relationship of a fare paying passenger, and to do so he is asking the Court to create that right or relationship by implication that it existed under and pursuant to an illegal or void contract, if made. The contract being *malum prohibitum,* it is void for all purposes and no legal rights can be supported thereon or thereunder.

In *In re T. H. Bunch Co.,* 180 Fed. 519, the Court stated that:

> "The law is well settled that, if the plaintiff does not require the aid of an illegal transaction to establish his claim, he may recover if the defendant has possession of a thing of value belonging to plaintiff."

and cited in support thereof *Dent v. Ferguson,* 132 U. S. 50, 33 L. ed. 342. Said Court further stated that the test of illegality is as follows (page 525):

> "'The test of illegality to determine whether plaintiff is entitled to recover *is his ability to establish his cause of action without aid from an illegal transaction.*'" (Italics ours.)

In *Miller v. Ammon,* 145 U. S. 421, 36 L. ed. 759, the Supreme Court of the United States stated (page 428, U. S.):

> "Passing to the other question, that must be answered in the negative. *The general rule of law is, that a contract made in violation of a statute is void; and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover.* * * *
>
> In the light of these authorities the solution of the present question is not difficult. By the ordinance, a sale without a license is prohibited under penalty. *There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful as between the parties, though unlawful as against its prohibitions; nor when we consider the subject-matter of the legislation, is there anything to justify a presumed intent on the part of the lawmakers to relieve the wrongdoer from the ordinary consequences of a forbidden act.* By common consent the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with those regulations by all engaging in the traffic is imperative;

> and *it cannot be presumed, in the absence of express language, that the lawmakers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations, and that disobedience should be attended with no other consequence than the liability to the penalty.* There is, therefore, nothing in the language of the ordinance or the subject matter of the regulations which excepts this case from the ordinary rule, that an act done in disobedience to the law creates no right of action which a court of justice will enforce." (Italics ours.)

Since, in the case at bar, both the law of the State of California and the Act of Congress expressly prohibit and declare unlawful any contract or act in violation of the Commerce Regulations and prescribe penalties for violations thereof, and since there is nothing in either of the laws which shows any intention on the part of Congress or the Legislature of the State of California to limit their operation and scope to the exacting of the penalty or fine, it is therefore clear that contracts made in violation thereof are void for all purposes.

Had Halcomb in fact paid a fare to Rose, his administrator might, under these and other cases, have recovered it; further, if Halcomb had promised to pay a fare to Rose, Rose's estate could not have recovered it. In neither case would an effective contract have existed, and much less can one be held to have existed here where there was neither payment nor promise.

In order for the plaintiff (appellee herein) to recover under the double indemnity clause of said life

insurance policy, it is necessary to show that he was a fare paying passenger, and that cannot be shown unless it is proved that there was a legal contract of carriage wherein and whereby he was legally obligated to pay a fare. In this proof the appellee has failed.

IV.

THE COURT ERRED IN THE ADMISSION OF EVIDENCE OF THE PRIOR VIOLATIONS BY MR. ROSE OF THE AIR COMMERCE REGULATIONS AND OF THE LAW OF THE STATE OF CALIFORNIA.

The Court permitted, over the objection of the defendant, the witness Halcomb to testify that on one occasion, some three months prior to the accident in question, Pilot Rose charged a fare for transportation in an aeroplane operated by himself. This evidence is entirely immaterial, incompetent and irrelevant. Proof of the violation of the law on one separate and distinct occasion is no proof of a violation under a separate and independent occasion. See, *Larson v. Larson,* 72 Cal. App. 169.

Keiter v. Miller, 170 Atl. 364, 365;

Listle Coal Co. v. Farmers' Bank, 135 Atl. 105, 106;

Williams v. Atl. Coast Corp., 134 S. E. 390, 394;

42 *C. J.* 744.

To permit the jury to imply from the evidence of the witness Halcomb that because of this separate and independent occasion some three months earlier, there was an implied contract that a fare would be charged

and paid on this occasion, is to permit the jury to imply that on the occasion in question the law had been violated contrary to the presumption created by the law of the State of California. (Section 1963 of the Code of Civil Procedure of the State of California.)

The said Code section of the State of California above referred to provides for certain presumptions: "(1) that a person is innocent of crime or wrong;" "(2) that the ordinary course of business has been followed;" and "(3) that the law has been obeyed."

The evidence, in reference to the flight in question, was undisputed that nothing was said or agreed upon between the parties as to the payment of a fare or a consideration, and therefore the presumptions above quoted must be drawn by the jury. No inference may be drawn from one isolated prior occasion or incident to rebut the presumption arising from a separate and distinct incident or transaction.

The presumption that the law has been obeyed is reinforced and corroborated by the presumption that the ordinary course of business has been followed. Mrs. Rose testified, as heretofore stated, that it was Mr. Rose's policy on all occasions to require the transport pilot, hired by him, to carry all fare paying passengers. (R. 103.) The fact that the ordinary course of business was violated on one occasion cannot destroy the effect of that presumption. The error in admitting this testimony was highly prejudicial in that the Court instructed the jury in effect that the inference from this one violation should be weighed against the presumptions heretofore cited. (R. 128.)

V.

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY IN THE PARTICULARS HEREAFTER STATED.

The Court refused to give the following instruction requested by said defendant, to-wit:

> "You are hereby instructed that you cannot infer in this case that the decedent George R. Halcomb paid fare to Ollie A. Rose, for the aeroplane flight involved in this case, from the fact that the said Ollie A. Rose on a prior occasion violated the law which prohibited him from accepting fare or compensation from any person for conveying him in his aeroplane, or, in other words, the fact that the said Rose may have accepted fare or compensation on another occasion, which he had no legal right to do, will not justify any inference that he collected fare or compensation from the said George R. Halcomb for the flight in question. To the contrary, I hereby instruct you that in the event you find that there is an absence of evidence as to whether a fare was charged or paid by Halcomb to Rose for said transportation in the aeroplane in question, it must be presumed by you that said Ollie A. Rose obeyed the law and did not accept compensation for the aeroplane flight on which the said George R. Halcomb was killed." (R. 83-84.)

The Court, however, charged the jury as follows:

> "The evidence in this case establishes that Ollie A. Rose, the pilot of the aeroplane in which George R. Halcomb was killed, was possessed of a private pilot's license at the time of the accident which resulted in the death of said George R. Halcomb, and that such pilot, Ollie A. Rose

was prohibited by the laws of the United States of America, and the State of California from carrying persons or property for hire.

You are instructed that the law presumes in the absence of evidence to the contrary, that a person is innocent of wrong, and that the ordinary course of business has been followed, and that the law had been obeyed. This presumption is to be considered with all the other evidence in the case, to determine whether or not George R. Halcomb was a fare paying passenger in the wrecked aeroplane." (R. 84.)

"It is for you gentlemen of the jury to say, from all the evidence in this case, whether there was an implied contract that the deceased was to pay a fare for the use of the plane." (R. 85-86.)

The instructions so given by the Court permitted the jury to disregard the presumptions declared by law and to infer from the fact that a fare was paid illegally on one isolated occasion, that George R. Halcomb was a fare paying passenger at the time in question, occurring some three months subsequent to the flight testified to by witness Halcomb.

As stated heretofore, the proof of the violation of the law on one occasion is not proof of the violation on a separate and distinct occasion. (See cases cited under preceding point.) Further, under the instructions given by the Court the jury was authorized to imply a contract covering the subject-matter which the law prohibited the parties from expressly contracting thereon; or, in other words, the Court instructed the jury that George R. Halcomb could be a

fare paying passenger in an aeroplane even though he did not pay a fare and was not legally bound or obligated to pay a fare.

The instruction was erroneous for the further reason that there was no evidence from which a contract to pay a fare could be implied. The evidence as to payment on a *former* occasion, even if properly admitted, afforded no basis for implication of an intent to pay a fare on *this* occasion, because the circumstances were entirely different. Here the circumstances and the proven facts as to the conversation show that the transaction was not regarded as a commercial one nor the flight so undertaken. Human life was in danger—Halcomb's brother was lost. Halcomb appealed to Rose for help and Rose responded "I will do anything I can * * * to help you". There is no suggestion here of commercial motives nor expectation of reward or compensation. It was a humane response to a human appeal. To imply a contract for the payment is to impune the motives of Rose.

CONCLUSION.

The phrase in the life insurance policy in question, to-wit, "a fare paying passenger", must be construed to mean a passenger in an aeroplane who has paid a fare under a legal contract of carriage. Here there was no payment of a fare and no express contract to pay a fare. If there was any contract it must be implied. The law will not imply the creation of an illegal contract. If a contract was created, it was illegal and

hence unenforceable and did not constitute Halcomb a "fare paying passenger" within the meaning of the policy. It is the policy of the law to presume that the law has been obeyed and not violated, and if this said policy is adopted in this case, the presumption and inference is that Ollie Rose was transporting George R. Halcomb without compensation, which he was authorized to do under the law. It cannot be implied that he was transporting said George R. Halcomb for a fare or compensation, which he was prohibited by law from doing.

It is submitted that the judgment of the United States District Court should be reversed, with directions to enter a judgment in favor of the plaintiff in the sum of $1929.20, under the single indemnity clause of said insurance company.

Dated, Sacramento, California,
February 25, 1935.

Respectfully submitted,

DEVLIN & DEVLIN & DIEPENBROCK,
HORACE B. WULFF,
Attorneys for Appellant.

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No. 7562

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellee.

BRIEF FOR APPELLEE.

In this action appellee recovered judgment on a life insurance policy because of the death of the insured in an aeroplane accident.

Two defenses were offered:

First. That the evidence is insufficient to show that the insured was a fare paying passenger; and

Second. If a fare paying passenger, recovery cannot be had in this action because the pilot of the plane was not licensed as required by the Air Commerce Act.

"The Courts have announced a rule to the effect that when the language employed in an insurance contract is ambiguous, or when a doubt arises

> in respect to the application, exceptions to, or limitations of, liability thereunder, they should be interpreted most favorably to the insured, or to the beneficiary or mortgagee to whom the loss is payable as his interest may appear. Such contracts are to be interpreted in the light of the fact that they are drawn by the insurer, and are rarely understood by the insured, to whom every rational indulgence should be given, and in whose favor the policy should be liberally construed."
>
> 14 *California Jurisprudence,* page 445.

This action is not based on the contract of carriage between the deceased and the pilot of the aeroplane, but rests entirely on the contract of insurance.

To entitle appellee to recover, it was only necessary to show that death resulted from bodily injury sustained by the insured as a fare paying passenger.

The intent of this clause of the policy was to avoid any liability on the part of the appellant in the event that the insured was riding for pleasure or in operating an aeroplane. The intention of the policy is fully subserved when it appears that the insured was a fare paying passenger. This is all that appellee was required to establish to recover from appellant.

THE DECEASED WAS A FARE PAYING PASSENGER.

The undisputed evidence shows that Ollie Rose was the owner of two aeroplanes which he let out for public hire. He had used one plane for this purpose for over two years and the other for a little over a year. These planes were used commercially at Red-

ding. He was running a school for students and any jobs that he could pick up. The business was known as the "Rose Air Service" and was also advertised as such. Tickets were sold to prospective customers at the air port.

(Record pages 96 and 97.)

The planes were rented out in the field to go any where any one wanted to go.

(Record page 98.)

Also for the purpose of taking passengers up in the air for short flights.

The deceased, George Halcomb, with other members of his family, was a passenger on one of these aeroplanes about two months prior to the accident and paid for his transportation.

(Record page 100.)

On the day of the accident, Halcomb visited the home of Rose and stated to him "You know my brother is lost, and I came down to see if you would take me up in the plane, I thought we might be able to see him up from the air". Rose agreed to go.

The evidence does not show that Halcomb was ever transported by Rose gratuitously. Nothing was mentioned in reference to the price or fare to be charged, nor did Halcomb say that he would make arrangements for the latter.

(Record page 102.)

The testimony of a brother of the deceased shows that on a former occasion Halcomb paid for his transportation.

(Record pages 105, 106 and 107.)

So we have the situation of Rose carrying on the business of transporting passengers for hire at a public air port in the Town of Redding; that he advertised his business as such; that the deceased always paid Rose for his transportation; that there was nothing in the relations of the parties or otherwise upon which to base any implication or assumption that any transportation would be rendered by Rose to Halcomb gratuitously.

The contract was created by the consent of the parties and is not one imposed by law from motives of public policy frequently against the intention of the parties.

Nevada Co. v. Farnsworth, 89 Fed. 164.

> "Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied."
>
> *Young v. Bruere,* 78 Cal. App. 132.

> "An implied contract arises from the request of one party and performance by the other, though the request is often inferred from the circumstances attending the performance."
>
> *Rebman v. San Gabriel v. L. & W. Co.,* 95 Cal. 393.

> "The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words."
>
> *Dunham-Carrigan-Hayden Co. v. Rubber Co.,* 84 Cal. 673.

In *United States Fidelity & Guaranty Co. v. Aschenbrenner,* 65 Fed. (2d) 976, the Court quotes from the case of *Purple v. Union Pac. R. Co.,* 114 Fed. 123, which holds as follows:

> "This contract of carriage may, it is true, be express or implied, but if it does not exist in either form the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoubtedly arises where one enters a passenger car and rides towards destination. See, also, Fels v. East St. Louis & S. Ry. Co. (C. C. A. 8), 275 F. 881-883; Pere Marquette R. Co. v. Strage, 171 Ind. 160, 84 N. E. 819, 821, 85 N. E. 1026, 20 L. R. A. (N. S.) 1041."

The evidence shows that Rose was engaged in the operation of an aeroplane for hire. It also shows that on previous occasions the deceased had been a passenger on these planes, and on one occasion was a passenger on a plane operated by Rose and paid him a fare.

Under the circumstances, the law will presume that Halcomb was a passenger for fare.

10 *Corpus Juris,* page 1040.

The fact that he was in an aeroplane used for the service of the public for hire and under the circumstances shown by the record justifies the conclusion *prima facie* that he was a passenger.

People v. Douglass, 87 Cal. 284;

4 *Ruling Case Law,* page 1015.

A passenger is one who travels in some public conveyance by virtue of a contract, express or implied as to the payment of fare or which is accepted as the equivalent therefor.

Georgia & F. R. Co. v. Tapley, 1916 C, L. R. A., page 1020.

We quote the following from Sections 487 and 488 of 4 *Ruling Case Law,* pages 1028 and 1029:

> "Every one not connected with the carrier and traveling openly by a passenger conveyance, is presumed *prima facie* to be there lawfully as a passenger, having paid, or being liable when called on to pay, his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser."
>
> "The usual rule applies that the presumption is always in favor of honesty and fair dealing, and he who asserts the contrary must prove it."
>
> "The question whether one is a passenger is one of mixed law and fact. What facts will create the contract relation of carrier and passenger is a question of law, but the existence or non-existence of such facts in each particular case is where there is a conflict of evidence on the point, a question of fact to be determined by the jury, and not one of law to be passed upon by the court."

That the evidence brings the case within the rule of implied contracts cannot be disputed. Rose performed the service for Halcomb; it was a useful service of a character usually charged for, and Halcomb expressed no dissent to any charge, but availed

himself of the service; a presumption to pay the reasonable value of the services is therefore implied.

The determination of this question of fact rested with the jury. The verdict of the jury in this case is fully sustained by evidence bringing the case within the rule of implied contracts announced in the foregoing authorities.

The making of this contract as decided in the case of *Dunham-Carrigan-Hayden Co. v. Rubber Co.,* supra, may be inferred by proof of conduct, as well as by proof of the use of words.

The appellant makes the point that a contract cannot be implied where the subject matter is illegal. The argument ignores the distinction between contracts implied in fact and implied in law. The distinction is well stated in *Nevada Co. v. Farnsworth,* 89 Fed. 164, as follows:

> "The whole theory of contracts implied in law was originated for the purpose of giving a remedy ex contractu for certain wrongs, and it does not promote clear thinking to embrace in one classification two things so essentially different as an obligation based on the consent of the parties and one imposed by law, from motives of public policy, frequently against the intention of the parties."

The same distinction is discussed in 13 *Corpus Juris,* pages 240 to 244. A contract implied in fact rests upon the assent of the parties. Contracts implied in law do not arise from consent of the parties, but from the law or natural equity. The latter class

is created by the law without regard to the assent of the parties and is dictated by reason and justice and rests solely on legal fiction. They are not contractual obligations at all in the true sense for there is no agreement, either express or implied.

Ignoring this distinction, a number of cases are cited in appellant's brief, to support the argument that the law will not imply a contract where the subject matter is illegal. For instance, the cases cited on page 12 of the brief are in support of the rule that a contractor cannot recover if he is not licensed as required by law. In these cases there was an express contract and it was sought to evade the illegality thereof by having the Court imply a contract as a matter of law to afford the plaintiff a remedy.

The case of *Zottman v. San Francisco,* 20 Cal. 97, involved an unauthorized contract of a corporation, and it was sought to recover on an implied obligation. The Court very properly held that the law would not imply an obligation to do that which it forbids the party to do what it agreed to do.

The Air Commerce Act does not forbid the making of any agreement of carriage, but only imposes a civil penalty on the pilot who operates without a license, which penalty may be remitted or mitigated by certain officials.

It is not a case of "where the law expressly forbids a person to perform services for compensation and expressly permits him to perform them without compensation".

As held in *Williams Stake Co. v. Roth,* 154 N. Y. S. 213, cited on page 14 of appellant's brief, there is nothing in the law providing that there cannot be a fare paying passenger except in an aeroplane operated by a licensed pilot.

THE FACT THAT ROSE, THE PILOT OF THE AEROPLANE HAD NO LICENSE DOES NOT BAR A RECOVERY BY APPELLEE.

The appellee insists that the right to recover because of the alleged illegality of the contract of carriage is not involved in this action because the appellee is not recovering on that contract.

The action is based on a contract of insurance, and all that is required by the terms of that contract is to show that the deceased was a fare paying passenger.

We will assume for the sake of the argument that the question of the illegality of the contract may be raised by the appellant, still that rule is not applicable to this case.

As stated, the only penalty provided by the Air Commerce Act for the navigation of an aeroplane without a license is "a civil penalty of $500 which may be remitted or mitigated by the Secretary of Commerce, the Secretary of the Treasury, or the Secretary of Labor, respectively, in accordance with such proceedings as the Secretary shall by regulation prescribe".

United States Code Annotated (Sup. 1933), Section 181.

There is nothing in the Statute providing that the violation of any of its terms will invalidate a contract, or forbidding that a contract of carriage may be made by such pilot, or making the act of a passenger unlawful in riding with an unlicensed pilot.

The rule as to the enforcement of unlawful contracts is not applied for the benefit of either party to the contract, but as a matter of public policy.

Harris v. Runnels, 13 L. Ed. 901; 12 Howard 78.

The appellant is relying upon the general rule that an illegal contract is void and unenforceable, but ignores the many exceptions to that rule.

We take the following quotations from *Dunlop v. Mercer,* 156 Fed. 545 (555-557):

> "The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the law-making power.
>
> There is no declaration in the statute that contracts of unqualified corporations doing business in the state without complying with the prescribed conditions shall be void. So far as we are able to ascertain, the Supreme Court of the state has never held that such was the meaning or the

> effect of the law. If that had been the purpose of the Legislature, it would have been easy to have made it manifest. A single line would have expressed and accomplished that purpose. The legal presumption is that the Legislature specified all the penalties it intended to impose, and it is not the province of the court to inflict more by construction. If contracts in violation of this statute are void, they are absolutely void, and none of the parties to them can enforce them. Such a result is unjust, inequitable, and inconsistent with the purpose of the law."

This statute imposes no specific penalties for its violation. The act is not *malum in se.* The purpose of the statute can be accomplished without declaring contracts in violation thereof illegal. In such case, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable.

This subject is elaborately considered and the authorities reviewed in *In re T. H. Bunch Co.,* 180 Fed. 527. That was an action involving the right of a carrier to recover on certain bills of lading which were handled by the carrier in a manner violating the statute by delivering the property transported without surrender and cancellation of the bills. We quote the following from the decision:

> "Does this statute prevent a recovery by the carrier of the value of property delivered in violation thereof and by the receiver converted to his own use? While there is some conflict among the decisions of the state courts as to the effect of an act not malum in se but only malum

prohibitum, the decisions of the national courts are practically unanimous that there is an important distinction. United States v. Bradley, 10 Pet. 343, 360, 9 L. Ed. 448; Spring Company v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Ewell v. Daggs, 108 U. S. 143, 150, 2 Sup. Ct. 408, 27 L. Ed. 682; Dunlop v. Mercer, 156 Fed. 545, 555, 86 C. C. A. 435.

In Ewell v. Daggs the court said:

> 'A distinction is made between acts which are mala in se, which are generally regarded as absolutely void in the sense that no right or claim can be derived from them, and acts which are mala prohibitum, which are void or voidable according to the nature of the thing prohibited.'

There is another equally well settled rule of law so far as the national courts are concerned. When a statute imposes specific penalties for its violation, where the act is not malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable.

The rule to be deduced from these authorities is that, when such a plea of illegality is set up, the court must examine the entire statute in order to discover whether or not the Legislature intended to prevent courts of justice from enforcing contracts based on the act prohibited, and unless it does so appear only the penalties imposed by the statute can be enforced.

It was no doubt supposed that these heavy penalties would deter carriers and their agents

from violating the statute, and the liability of the carrier for the loss sustained by purchasers of the bills or warehouse receipts would protect them, and thus remedy the mischief then prevailing. To impose the additional liability on the carrier of depriving him of the right to maintain an action for the goods obtained without surrender of the bill of lading or the value if converted was evidently not deemed necessary, for it would award a premium to one of the wrongdoers and add to the severe punishment of the carrier provided by the statute. Courts should place no such construction on the act unless this intention is clearly expressed in the act."

In re T. H. Bunch Co., 180 Fed. 527:

"It is the contention of appellant that the effect of article 4954 is to render void, or at least unenforceable for its full amount, a life insurance policy issued in this state to one aged 64 years, at the premium rate for one aged 48 years. Such a policy contract does contravene the prohibition against discriminations between policy holders; but it does not necessarily follow that the courts will adjudge it void or refuse to enforce it. The effect of the statute on the forbidden contract depends on the legislative intent.

The statute does not denounce as void any policy which violates its terms. The expressly declared consequences of infractions of the statute appear to be ample to secure its obedient observance. The Supreme Court of the United States was of the opinion that, where this was true, it was the reasonable implication that the legislature meant for only the statutory remedies to be applied, and it did not mean for courts

to refuse to enforce contracts which were not declared void or unenforceable, though in contravention of the statute. Harris v. Runnels, 12 How. 79, 13 L. Ed. 901.

The language of the statute shows that the Legislature did not regard the insured and the insurer as in pari delicto in making the contracts sought to be prevented. The insurer and the insurer's agents are alone to be punished, and are alone expressly subjected to forfeiture. The command to refrain from the discriminatory acts is addressed to the insurance companies alone.

We sanction the declaration of Judge Selden, quoted with approval in a later opinion of the New York Court of Appeals, that—

> 'It is safe to assume that whenever the statute imposes a penalty upon one party and none upon the other, they are not to be regarded as pari delictum'. Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 145; Irwin v. Curio, 171 N. Y. 409, 64 N. E. 161, 58 L. R. A. 832.
>
> It would not be in accord with either the public policy declared by the act wherein the statute is found or the ends of justice to permit insurance companies to issue discriminatory policies of life insurance and collect and retain the premiums thereon and to then refuse payment after the death of the insured."
>
> *American Nat. Ins. Co. v. Tabor,* 230 S. W. 399.

When a criminal statute imposes specific penalties for its violation, where the act is not *malum in se,* and the purpose of the statute can be accomplished without declaring contracts in violation thereof ille-

gal, the inference is that it was not the intention of the lawmakers to render such contract illegal and unenforceable.

Guffey-Gillespie Oil Co. v. Wright, 281 Fed. 787.

Appellant quotes the decision of the Supreme Court in *Miller v. Ammon,* 145 U. S. 421, 36 L. Ed. 759, on page 27 of its brief, but omits all reference to the exceptions to the rule which are recognized in the opinion.

The Court quotes with approval from *Harris v. Runnels,* above cited.

As stated in *In re T. H. Bunch Co.,* while there is some conflict among the decisions of the state Courts as to the effect of an act not *malum in se* but only *malum prohibitum,* the decisions of the national Courts are practically unanimous that there is an important distinction.

The United States Supreme Court in *Yates v. Jones National Bank,* 51 L. Ed. 1012; 206 U. S. 158, says:

> "Where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed by the statute is the exclusive test of liability."

The appellant relies upon the case of *Smith v. Bach,* 183 Cal. 259, but this decision is in harmony with the cases we have cited. It must be read in the light of the statute before the Court. It arose out of a contract for the sale of certain lands in a subdivision in San Diego County. Plaintiff paid a part of the purchase price under the terms of the contract of sale, and sued to recover the same upon the ground that the contract

relating to the sale was void. This invalidity was based upon the Act of March 15, 1907 (Statutes 1907, page 290), making it unlawful to sell or offer for sale land by reference to an unrecorded map. Section 8 of this Act specifically provided that "No person shall sell or offer for sale any land or parcel of land by reference to any map or plat unless such map or plat has been made, certified, endorsed, acknowledged and filed in all respects as provided in this Act, etc."

Here we have the instance of an express provision in the statute prohibiting the making of the contract involved in the action.

We quote the following from page 262 of the opinion:

> "For the purpose of ascertaining the legislative intent, courts should consider the entire statute, and if from such consideration it is manifest that the legislature had no intention of declaring a contract void, they should be sustained and enforced, otherwise they should be adjudged void. (Dunlop v. Mercer, 156 Fed. 548 (86 C. C. A. 435).) Here it is manifest from a reading of the entire act that the statute in question was passed for the protection of the public and not as a revenue measure. (King v. Johnson, 30 Cal. App. 63 (157 Pac. 531).) In such a case a contract made in violation of its terms should be held to be void. (Levinson v. Boas, 150 Cal. 193 (11 Ann. Cas. 661, 12 L. R. A. (N. S.) 575, 88 Pac. 825); Pangborn v. Westlake, 36 Iowa 548.) The general rule controlling in cases of this character is that where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not ex-

pressly pronounce it so, and it is immaterial whether the thing forbidden is *malum in se* or merely *malum prohibitum*. A statute of this character prohibiting the making of contracts, except in a certain manner, ipso facto makes them void if made in any other way. (13 Cyc. 351; 13 Corpus Juris, p. 410.) The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void. This general rule finds support in the decisions of this state. (Berka v. Woodward, 125 Cal. 127 (73 Am. St. Rep. 31, 45 L. R. A. 420, 57 Pac. 777), and cases cited; Bentley v. Hurlburt, supra.)

It is true as stated by Mr. Justice Sloss in Bentley v. Hurlburt, that cases may be found holding a contrary doctrine, but an examination of those cases will, as hereinbefore stated, show that the statutes upon which they are based, generally do not prohibit, but merely impose, a fine as an exclusive punishment."

This decision is in harmony with the other authorities pointing out the distinction where the contract is prohibited by statute and where there is no prohibition, but simply a fine as a punishment.

The act in question does not make it a crime nor prescribe any punishment other than the civil liability for the violation of any of its provisions.

This statute permits the doing of the act by paying the penalty which is a species of license money exacted for the privilege of doing the act, and no other act is made unlawful by the statute.

6 *Ruling Case Law*, page 704.

> "When, however, the thing accomplished is proper and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good."
>
> *Berka v. Woodward,* 125 Cal. 126.

Before a Court should declare a contract not *malum in se* opposed to sound public policy, it must be entirely satisfied that the public will be substantially benefited and that such advantage is not merely theoretical or problematical.

Cox v. Hughes, 10 Cal. App. 563.

> "Where a statute commands certain parties to do certain acts and prescribes the penalties for their violation of its command, it is not the province of the courts to inflict other penalties upon innocent parties not named in the law on account of such a violation."
>
> *Hanover National Bank v. First National Bank,* 109 Fed. 426.

HALCOMB WAS NOT IN PARI DELICTO WITH ROSE.

Halcomb had every reason to assume that Rose was lawfully engaged in business. There is nothing to sustain an inference that Halcomb either knew or had any reason to know that Rose was operating without a license. Rose had publicly carried on the business of transporting passengers at the Redding Air Port in a manner indicating that his business was lawful.

While, of course Halcomb was presumed to know the law, it does not follow that he should be assumed to have known the fact that Rose had violated the law. This rule is very clearly stated in the case of *Becker v. Stineman,* 115 Cal. 745, as follows:

> "Based upon the findings of the court the evidence discloses facts similar to those in the case of Hammeon v. Amalgamated Copper Mines Co., 95 Cal. App. 400 (273 Pac. 74), which was an action to recover from defendants on certain promissory notes issued by them in violation of a permit of the corporation commissioner. Defendant claimed and cited authorities holding that while one who has received the benefit of an illegal private contract is estopped to plead its invalidity, such rule does not apply to contracts which are void as against public policy. The trial court there found that the respondent had no knowledge of the failure to obtain a permit, but it was argued that she must be presumed to have known the law and that the notes were void, and that having failed to demand proof of the existence of a permit respondent passively if not actually became a participant in violating the law. The court held that it was true that respondent must be presumed to have known the law requiring the possession of a permit as a prerequisite to the issuance and sale of securities, but it does not follow that she should be assumed to have known the fact that appellant had violated the law. Respondent was entitled to assume that the law had been complied with. In such a case the complaining party is protected, the prohibition being for his benefit and not being *in pari delicto* he is entitled to relief. (13 Cor. Jur. p. 501, sec. 443.)

> It is the duty of the court in furtherance of justice to aid one not *in pari delicto* though to some extent involved in the illegality, but who, as here found, is comparatively the more innocent and to permit him to recover back the property or its value as the circumstances of the case may require. (Hemmeon v. Amalgamated Mines Co., supra, at p. 402.)"

It cannot be held that Halcomb was *in pari delicto* in any respect whatever in the absence of evidence showing that he knew that Rose was operating without a license.

As held in this case, Rose was entitled to assume that the law had been complied with and "in such a case the complaining party is protected, the prohibition being for his benefit and not being *in pari delicto* he is entitled to relief".

In *Colby v. Title Ins. and Trust Co.,* 160 Cal. 640, it was asserted that the consideration for the execution of the instrument involved therein was the compounding of a felony and therefore an illegal consideration, all the parties, including the plaintiff, were *in pari delicto,* and that under such circumstances equity would not lend its aid to any of the parties. After deciding that as a general rule, Courts will not aid one party or another to an illegal transaction where they stand *in pari delcito,* the Court holds as follows:

> "But this rule only applies where the parties are *in pari delicto*—where the illegal transaction is entered into voluntarily and the turpitude of the parties is mutual. Where, in the cases cited,

> the rule has been applied, it will be found that both parties entered into the illegal contract or transaction there under consideration voluntarily, were equally culpable, and relief was refused on that account."

Several authorities are quoted in the opinion sustaining the rule and holding that the parties are not *in pari delicto* unless they were equally in fault.

It must appear that the parties to the illegal contract are *in pari delicto* and equally in fault.

Witham v. Allen, 130 Cal. 199.

> "If the parties are *in pari delicto,* the law will help neither, but leaves them as it finds them. But if two persons are in delicto, but one less so than the other, the former may, in many cases, maintain an action for his benefit against the latter."
>
> *Daniels v. Tearney,* 102 U. S. 416 (421), 26 L. Ed. 189.

The Court in its opinion also cites the following rule from *Story on Contracts:*

> "If the contract be executed however, that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract, for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege."

Here we have the anomalous situation of this appellant which was not a party to the contract trying to

take advantage of one who was a party to the contract.

> "All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into *by both* the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. Broom. Leg. Max. 732." (Italics ours.)
>
> *Ewell v. Daggs,* 108 U. S. 142 (149), 27 L. Ed. 683 (684).

For a general discussion of the rule, see the following text books:

1 *Pomeroy's Equity Jurisprudence,* Section 403;
2 *Elliott on Contracts,* page 1103;
6 *Ruling Case Law,* page 833.

Counsel seek to distinguish some of the cases by arguing that the innocent party in such case was permitted to recover the money with which he parted on the basis of the illegal contract, but the argument ignores the proposition that the principle underlying these decisions is that the parties were not *in pari delicto.*

There seems to be no conflict between the State and Federal authorities on the subject of the exceptions to the rule and when it will be applied by the Court as a matter of public policy. It is not a question of the law of contracts, but a question for each Court to decide as to whether the contract will or will not be

enforced on the grounds of public policy, or that it is illegal.

Consequently, we feel that it is unnecessary to burden the Court with any detailed analysis of the authorities cited by the defendant.

In cases arising from violations of the liquor laws, the Courts have construed the statute as meaning that the law makers did not intend that the contracts forbidden by the regulations should be as valid as though there were no such regulations. In these cases, Courts recognize the exceptions to the general rule, but hold that under a proper construction of the statute, such violations are not included within the exceptions, but are governed by the general rule.

We respectfully submit that for the following reasons the plaintiff is entitled to prevail:

First. It cannot be assumed that Halcomb knew that Rose had violated the law by operating without a license.

Second. Halcomb was entitled to assume that the law had been complied with.

Third. Halcomb was not *in pari delicto* and is therefore entitled to relief.

Fourth. The statute does not prohibit the making of contracts of carriage.

Fifth. The general rule that an illegal contract is void is not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a

penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the Courts to affix additional penalties not directed by the lawmaking power.

Sixth. There is no declaration in this statute rendering any contract of carriage invalid. If such had been the intent of the Legislature as decided in *Dunlop v. Mercer,* a single line would have expressed and accomplished that purpose. The legal presumption is that the Legislature specified all the penalties it intended to impose and it is not the province of the Court to inflict more by construction.

Quoting from that opinion, to give such construction to this statute, by the appellant not a party to the contract attempting to defeat a recovery on this life insurance policy would bring about a result "unjust, inequitable and inconsistent with the purpose of the law".

Seventh. Halcomb was a passenger.

THE COURT DID NOT ERR IN ADMITTING EVIDENCE SHOWING THAT HALCOMB HAD PREVIOUSLY PAID ROSE FOR TRANSPORTATION.

It is argued on page 29 of the brief that the Court erred in permitting proof of the fact that Halcomb had on one occasion paid Rose a fare was inadmissible.

Primarily this evidence was admissible to show that the service rendered Halcomb was of a character for which a charge was usually made, and for which a charge was made. It was admissible in connection with all of the other evidence showing the existence of the Redding Air Port; that Rose was engaged in the general passenger business; advertised as such; held himself out as a person engaged in commercial aviation for a profit, and that he charged therefor. All of these circumstances were proper to be considered by the jury in determining the question of implied contract. Particularly that "it was a useful service of a character usually charged for", as held in *Young v. Bruere,* 78 Cal. App. 132. It was admissible as a part of the conduct of the parties involved from which the jury could infer that there was an implied agreement to pay the reasonable value of the transportation.

It was admissible to establish that the services having been rendered, the law would imply an agreement to pay at least the reasonable value thereof.

Semi-Tropic Assn. v. Johnson, 163 Cal. 642.

It was also admissible under the rule stated in *Larson v. Larson,* 72 Cal. 169, cited by appellant, on the issue of the illegality of the contract and as bearing upon the proposition that Halcomb was not *in pari delicto.* It was competent to show the doing of the same or a similar act as bearing on his good faith and innocent intent.

Presumptions are indulged to support the absence of facts and are the weakest sort of evidence.

Williams v. Hasshagen, 166 Cal. 386.

The only issue submitted to the jury was that of implied contract. This evidence was competent and material on that issue. It was a fact proper for the jury to consider in drawing the inference as to the implied agreement to compensate Rose for the transportation in the absence of evidence showing an express agreement.

Assuming that the presumption of innocence and that the law has been obeyed are applicable as argued by the appellant then this evidence was admissible to overcome these presumptions by showing an agreement, express or implied, that Halcomb was a fare paying passenger.

The appellant is entirely in error that the mere absence of an express agreement to pay fare is conclusive and that the case is controlled solely by these presumptions and that the evidence was not admissible on the issue of implied contract to pay a fare.

THE COURT DID NOT ERR IN RULING ON THE INSTRUCTIONS TO THE JURY.

The first error assigned by the appellant in connection with the instructions is the refusal of the instruction printed on page 31 of the appellant's brief. First, the instruction was not proper because it stated that

> "The fact that the said Rose may have accepted fare or compensation on another occasion, which he had no legal right to do, will not jus-

tify any inference that he collected fare or compensation from the said George R. Halcomb for the flight in question."

This portion of the instruction took from the jury the right to consider the former collection of fare and bearing on the proposition of an agreement, express or implied to pay the reasonable value of the transportation involved in this action. It is contrary to the rule that the presumption cannot be applied where there is evidence to the contrary.

In the concluding portion of the instruction, the Court was asked to instruct the jury that in the absence of evidence as to whether a fare was charged or paid

> "*It must be presumed by you that said Ollie A. Rose obeyed the law and did not accept compensation* for the aeroplane flight on which the said George R. Halcomb was killed."

This is an instruction on the facts and would take from the jury the right to decide whether or not such presumption was overcome by the proof, and established by proof that there was an express or implied agreement to compensate Rose.

This is a question for the jury.

Volquards v. Meyers, 23 Cal. App. 504.

The instructions printed on page 32 of the appellant's brief correctly stated the law and did not permit the jury to disregard any presumption declared by law.

The Court also instructed the jury

> "In this connection you may consider also the fact that Rose was not a licensed transport pilot, although the presumption is that he did not take up passengers for hire in violation of the regulations of the Department of Commerce."
>
> (Record, page 129.)

The Court properly left the whole question of fact involving the evidence and the presumptions to the jury in accordance with the well established rule.

CONCLUSION.

The policy does not provide that "a fare paying passenger" is one who has paid a fare under a legal contract of carriage. The policy covered the risk of being a passenger in a commercial aeroplane.

All of the argument of the appellant is ably and conclusively answered by the memorandum opinion of the late Hon. Frank H. Kerrigan, the trial judge, appearing on page 64 of the record.

The issue submitted to the jury was the question of fact as to Halcomb being a fare paying passenger. All other questions were determined by the Court.

If the position of the appellant is sound, then no action could be based upon a contract of carriage by a ship if it appeared that it was being operated by an unlicensed master nor on a contract of carriage entered into by a passenger with a railroad company

where it appeared that the railroad company had failed to comply with some provision of law connected with the operation of its trains, or that the trains were being operated in an unlawful manner.

We repeat that the defense relied upon is not available to the appellant, and if available, the Court will not deny relief to the beneficiaries of this policy in the face of the fact that the deceased acted in good faith, had every reason to believe that he was flying in a commercial aeroplane.

The evidence clearly brings the case within the provision of the policy with reference to the insured being a fare paying passenger.

As stated in the opinion of Judge Kerrigan that

> "To hold that it did not make the deceased a fare paying passenger would twist language beyond its plain meaning," and
>
> "It would involve rewriting the exception in the insurance contract to provide that the insured must be 'a fare paying passenger upon an airplane operated by a duly licensed transport pilot'."
>
> Also "that would be a narrowing of the risk by interpretation contrary to the principle of law that insurance contracts are construed in case of doubt against the insurer who wrote the instrument".

We therefore respectfully submit that the judgment should be affirmed.

Dated, Woodland, California,
March 29, 1935.

Respectfully submitted,
L. C. SMITH,
HUSTON, HUSTON & HUSTON,
Attorneys for Appellee.

No. 7562

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY (a corporation),

Appellant,

vs.

AMOS HALCOMB, as Administrator of the Estate of George R. Halcomb, also known as George Raymond Halcomb, Deceased,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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Table of Authorities Cited

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellee respectfully petitions for a rehearing and thereupon shows:

The attention of the Court is directed to the Air Commerce Act. This act does not prohibit the making of a contract of carriage, nor is the act of operating an aeroplane contrary to the provisions made a crime. The only penalty is "a civil penalty of $500 which may

be remitted or mitigated by the Secretary of Commerce, the Secretary of the Treasury or the Secretary of Labor, respectively, in accordance with such proceedings as the Secretary shall by regulation prescribe".

United States Code Annotated (Sup. 1933) Section 181.

We repeat that there is nothing in the statute invalidating any contract of carriage or forbidding the making of a contract of carriage by a pilot or making the act of a passenger in riding with an unlicensed pilot unlawful.

The jury under proper instructions of the Court found that a contract of carriage had been made. As between the parties, this is a binding contract, and the only question is, will the Court refuse to enforce the contract because of the absence of a license on the theory that Courts in certain cases will decline to enforce illegal contracts?

We respectfully submit that this contract is within the exception stated in *Dunlop v. Mercer,* 156 Cal. 545, cited on page 10 of appellee's brief. The exception is that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the Courts to do so, and they will not thus affix an additional penalty not directed by the law-making power.

This same distinction is recognized in the case of *Ewell v. Daggs,* 108 U. S. 143 (150), 2 Sup. Ct. 408, 27 L. Ed. 682.

There is also another equally well settled rule and that is that if the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the law makers to render such contracts illegal and unenforceable.

So, appellee respectfully suggests that under these authorities, when a plea of illegality is set up, the Court must examine the entire statute to discover whether or not the Legislature intended to prevent Courts of justice from enforcing contracts based on the act prohibited.

There is nothing in this statute indicating that it was the legislative intent that any penalty should be attached to the violation of the contract other than that specifically imposed by the statute. This rule is particularly applicable to this statute because it only inflicts a civil penalty. The act is not made criminal and there is no provision of the statute providing that a contract made in violation thereof is void.

We also emphasize the proposition that the statute imposes no penalty upon the passenger.

As stated by the United States Supreme Court in *Yates v. Jones National Bank,* 51 L. Ed. 1012; 206 U. S. 158, "Where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed by the statute is the exclusive test of liability".

This statute permits the doing of the act by paying the penalty which is a species of license money exacted for the privilege of doing the act, and no other act is made unlawful by the statute.

6 *Ruling Case Law* 704.

We call attention to the quotation from *Story on Contracts* on page 21 of appellee's brief declaring the rule that

> "If the contract be executed however, that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract, for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege".

Here, the jury has found that a contract was made by the assent of the parties.

We respectfully suggest that the distinction between contracts implied in fact and contracts implied by law is very marked and well defined.

The right of recovery herein does not depend upon the Court implying a contract as a matter of law. The existence of the contract was determined by the verdict of the jury.

> "A distinction exists between contracts implied in fact and those which are implied in law. The former are implied contracts, and the latter are quasi contracts. In a quasi contract the contract is a mere fiction; the intention being disregarded. In an implied contract the intention is ascertained and enforced. 'In one, the intention is disregarded; in the other it is ascertained and en-

forced'. *Hertzog v. Hertzog,* 29 Pa. 465, 468. A quasi contractual obligation is imposed by law for the purpose of bringing about justice, without regard to the intention of the parties.

In quasi contract there is no contract obligation in the true sense, for there is no agreement; but it is clothed with the semblance of contract for the purpose of the remedy. *Nevada Co. v. Farnsworth* (C. C.) 89 F. 164; See *People v. Dummer,* 274 Ill. 637, 641, 113 N. E. 934; *Mathie v. Hancock,* 78 Vt. 414, 417, 63 A. 143. In 40 Cyc. 2807, the law is stated as follows:

'But where an obligation is imposed by law upon one to do an act and he fails to perform it, because of the interest of the public in its performance, one who does perform it, with the expectation of receiving compensation is entitled to recover.'

In Williston on Contracts, Vol. 1, Sec. 3, that writer says:

'* * * All rights enforced by the contractual actions of assumpsit, covenant and debt were regarded as based on contracts. Some of these rights, however, were created, not by any promise or mutual assent of the parties, but were imposed by law on the defendant irrespective of, and sometimes in violation of his intention. Such obligations were called implied contracts. A better name is that now generally in use of quasi contracts. This name is better since it makes clear that the obligations in question are not true contracts, and also because it avoids confusion with another class of obligations, which have also been called implied contracts. This latter class consists of obligations arising from mutual agreement and

intent to promise, but where the agreement and promise have not been expressed in words. Such transactions are true contracts, and have sometimes been called contracts implied in fact.'

In 13 C. J. 244, it is said:

'Contracts implied in law, or more properly quasi or constructive contracts, are a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, and which are allowed to be enforced by an action ex contractu.'

City of New York v. Davis, 7 Fed. (2d) 566.

'A contract implied in fact is a true contract, the agreement of the parties being inferred from the circumstances, while a contract implied in law is but a duty imposed by law and treated as a contract for the purposes of a remedy only.' ''

13 *Corpus Juris* 240.

The only distinction between a contract implied in fact and an express contract rests in the mode of proof. The nature of the understanding is the same and both express contracts and contracts implied in fact are founded on the mutual agreement of the parties.

13 *Corpus Juris* 242.

The right of the appellee to a recovery does not depend upon the Court implying a contract as a matter of law. The contract is established by the proof and the verdict of the jury. The only question is, will the Court decline to recognize this contract because it was made in violation of the Air Commerce Act?

As argued in our brief and suggested herein, the true rule is that the question is one of legislative intent, and the Courts will look to the language of the statute, the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purposes sought to be accomplished in its enactment. If from all these it is manifest that the statute was not intended to imply a prohibition or render the prohibited act void, the Court will so hold and construe the statute accordingly.

This rule is stated in *Harris v. Runnels* cited in the opinion.

> "It is familiar law that not every contract in contravention of the terms of a statute is void, and the Courts will search the language of the statute to see whether the intent of the makers that a contract in contravention of it should be void or not."
>
> *Burck v. Taylor,* 152 U. S. 634; 38 L. Ed. 578.

What facts will create relation of carrier and passenger is a question of law. The existence or nonexistence of such facts in each particular case is where there is a conflict of evidence on the point. The finding of the jury is conclusive.

4 *Ruling Case Law* 1028 and 1029.

Assuming that the owner of the plane could not recover under the rule stated in the cases cited in the opinion, still that is an entirely different question from the right of the passenger to recover on this contract of insurance. Here was an express contract binding the company to pay the loss provided the deceased was a fare paying passenger. The jury has found that there

was a contract of carriage and that he was a fare paying passenger.

The only objection to a recovery is that the pilot of the ship was not licensed. Even granting that the pilot could not have recovered under the rule stated, still this contract of carriage between Halcomb and the pilot was a contract resting upon their assent and is not a contract which the Court is called upon to imply as a matter of law.

We repeat that the sole question before the Court is, will the Court refuse recognition of this contract under the rule of public policy? On this issue, we think the law is clear that because Halcomb was not *in pari delicto* the statute does not denounce the contract as void, and there is nothing in the statute supporting the proposition that the Legislature intended to prohibit the making of such contracts.

The effect of this decision is very far reaching. Suppose a passenger purchased a ticket from a railroad company in violation of some rule of the Interstate Commerce Commission or some Federal statute governing the carrier. Under this rule, such passenger would be deprived of his right to recover for any injuries sustained by reason of the negligence of the carrier.

In other words, the rule announced in the opinion is a very broad and comprehensive one, and viewed in the light of the statute in force will prevent a recovery of contracts made by persons wholly innocent and without any knowledge that any regulation or law has been violated by the party with whom they are con-

tracting. In other words, every person becoming a passenger on an aeroplane, as well as on all other carriers where licenses or regulations are enforced is at the peril of determining whether a license has been issued and all Federal regulations observed.

> "To the general principle that ignorance of the law is no excuse for making a contract violating that law, there are some exceptions. The rule does not apply where the performance of the agreement in the manner intended would, unknown to parties, be illegal, but a legal method of performance is possible. Nor does the rule apply where the mistake is really one of fact and not of law. Where a person sues for services rendered another in an occupation which is illegal, unless the employer is duly licensed to carry it on, which he is not, such person may recover unless he knew that the employer had had no license, for while he is bound to know that the employer must have a license to make the business legal, his mistake as to his having such license is a mistake of fact and not of law. So it is held that a bond given to a person to indemnify him against liability for seizing goods under a writ or for arresting a person, is illegal if the person to whom it is given knew the seizure or arrest to be without right, but legal if he believed it to be authorized. An agreement is not necessarily illegal because carried out in an illegal way, if this was not contemplated when the agreement was made. Where the contract is illegal for other reasons than that it involves moral turpitude, ignorance of the illegality of the contract on the part of the party seeking relief has been considered as strong ground for granting relief to him".
>
> 13 *Corpus Juris* 516.

Appellee therefore respectfully submits that a rehearing should be granted and the judgment should be affirmed.

Dated, Woodland, California,
November 29, 1935.

Respectfully submitted,
L. C. SMITH,
HUSTON, HUSTON & HUSTON,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL.

The undersigned counsel for appellee herein do hereby certify that in their judgment, the said petition is well founded and that it is not interposed for delay.

Dated, Woodland, California,
November 29, 1935.

L. C. SMITH,
HUSTON, HUSTON & HUSTON,
Attorneys for Appellee and Petitioner.

No. 7569

United States

Circuit Court of Appeals

For the Ninth Circuit.

LAKE UNION DRY DOCK & MACHINE WORKS, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. WRIGHT, JONES & BRONSON,
610 Colman Building, Seattle, Washington.
Attorneys for Appellant.

Messrs. J. CHARLES DENNIS and
JOHN AMBLER,
222 Post Office Building, Seattle, Washington.
Attorneys for Appellee. [1*]

United States District Court Western District of Washington, Northern Division.

No. 20729

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LAKE UNION DRY DOCK & MACHINE WORKS, a corporation,
Defendant.

COMPLAINT.

Comes now the UNITED STATES OF AMERICA, plaintiff herein, by Anthony Savage, United States Attorney for the Western District of Washington, and Jeffrey Heiman, Assistant United States Attorney for said District, and complaining of the defendant herein, alleges:

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

I.

That during all the times hereinafter mentioned, the plaintiff herein was and is now a corporation sovereign.

II.

That the defendant LAKE UNION DRY DOCK & MACHINE WORKS is a corporation existing under the laws of the State of Washington with its principal place of business in the City of Seattle, State of Washington, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court.

That the defendant at all times hereinafter mentioned conducted a dry dock and machine works located in the City of Seattle, Division and District aforesaid, for the repair and rebuilding of vessels.

III.

That on or about the 30th day of December, 1931, the Coast Guard Cutter "GUARD" was in the dry dock of the defendant corporation undergoing repairs; that said defendant corporation had contracted with the Treasury Department, United States Coast Guard, a branch of the Government of the United States to repair the United States Coast Guard vessel "GUARD"; that said contract was executed on the [2] 18th day of November, 1931, and provided for the repair of the "GUARD" by the defendant corporation at the plant of the defendant corporation, said contract further containing a provision as follows:

GENERAL CONDITIONS—FIRE PROTECTION. It is clearly understood that the

contractor agrees to furnish the vessel ample fire protection during the time in dry-dock or on the marine railway.

IV.

That the United States Coast Guard cutter "GUARD" was on or about the 30th day of December, 1931, in the dry dock of the defendant corporation for repairs pursuant to said contract heretofore referred to, and that on said date a fire originated upon the premises of the defendant corporation, and because of the negligence of the defendant corporation, its officers and employees, said fire spread to the United States Coast Guard Cutter "GUARD" while in the defendant's dry dock aforesaid; that as a result of said fire the United States Coast Guard Cutter "GUARD" was burned and damaged to such an extent that it was necessary to have said vessel repaired; that the defendant corporation herein repaired said vessel for damages sustained as a result of said fire under contract No. Tcg. 15520, for which work the defendant corporation was paid the sum of Three thousand three hundred sixty-two Dollars ($3,362.00); that the sum of $3,362.00 which was paid for the repair of the United States Coast Guard Cutter "GUARD" is the amount of damage the plaintiff suffered as a result of the negligence of the defendant corporation as aforesaid.

V.

That the defendant corporation carelessly and negligently failed in violation of their contract made and executed on the 18th day of November, 1931, and in special violation of the provision heretofore stated with reference to fire protection, failed to provide ample fire protection for said vessel, to-wit: said defendant corporation failed to provide a hose suitable for fire fighting, [3] failed to provide fire fighting equipment, and failed to provide men necessary for the fighting of said fire.

VI.

That due demand has been made by the plaintiff herein from the defendant corporation for payment of the sum of Three thousand three hundred sixty-two Dollars ($3,362.00) and the defendant corporation has failed, neglected and refused to pay the same, or any part thereof.

WHEREFORE, the plaintiff prays for judgment against the defendant corporation LAKE UNION DRY DOCK & MACHINE WORKS, in the sum of Three thousand three hundred sixty-two Dollars ($3,362.00), together with interest thereon at the legal rate from December 30th, 1931, until paid and for its costs and disbursements to be taxed herein.

ANTHONY SAVAGE
United States Attorney.
JEFFREY HEIMAN
Assistant United States
Attorney.

United States of America,
Western District of Washington,
Northern Division—ss.

JEFFREY HEIMAN, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and as such makes this verification for and on behalf of the United States of America.

That he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

JEFFREY HEIMAN

Subscribed and sworn to before me this 15th day of November, 1932.

[Seal] S. COOK
Deputy Clerk, United States District Court, Western District of Washington.

[Endorsed]: Filed Nov. 15, 1932. [4]

[Title of Court and Cause.]

ANSWER

Comes now the Lake Union Dry Dock & Machine Works, a corporation, defendant above named, and for answer to plaintiff's complaint herein, admits, denies and alleges as follows:

I.

Referring to paragraph IV, defendant admits that the fire therein referred to spread to the cutter

Guard, but denies that this was occasioned by or resulted from the negligence of the defendant in any way whatsoever; admits that the Guard was burned and damaged so that it was necessary to have the same repaired, but denies that the work therein referred to and the expense thereof alleged to amount to the sum of $3,362.00, was loss or damage caused or resulting from the negligence of the defendant.

II.

Referring to paragraph V of said complaint, denies each and every allegation therein contained.

And for an Affirmative Defense to said action, defendant alleges as follows:

I.

That pursuant to the regulations of the Coast Guard Department, it is the order and the practice of the Department [5] to keep on board any vessel at all times a sufficient number of men for the performance of watch, patrol and other duties, and the protection and care of the vessel, and that at the time of said fire the Cutter Guard had on board two or more members of her crew; that said members of the crew were awakened at the time said fire originated, which was at a point considerably removed from the location of said vessel; that at such time and for a period of fifteen or twenty minutes subsequent thereto, the said vessel was not in proximity to the fire, and was not subject to damage therefrom; that said vessel was then resting upon a small floating dry dock moored to

the southerly side of the wharf, upon which said fire originated, that there was a slight breeze from the north, and that had the crew of the Guard simply cast off the lines by which the dry dock was moored to the wharf, the said dock, together with the Guard resting thereon, could have been easily pushed or would have drifted across the waterway to the south, and would have sustained no damage whatsoever by reason of said fire; that the crew of the Guard made no effort to save or protect said vessel, and had they made a reasonable effort so to do, as required by their duty and regulations, and by common prudence under the circumstances, said vessel would have been protected and saved from any injury whatsoever; that such damage as occurred was directly attributable to and resulted from the negligence of the crew of the Guard in failing to take proper precautions for the safety of said vessel, and that defendant is not responsible therefor.

WHEREFORE, defendant prays that said action may be dismissed, and that it have and recover its costs and [6] disbursements herein.

BRONSON, JONES & BRONSON
Proctors for defendant.

United States of America,
Western District of Washington,
Northern Division.—ss.

H. B. JONES, being first duly sworn, on oath deposes and says: That he is Secretary of Lake

Union Dry Dock & Machine Works, a corporation, defendant above named, and that he makes this verification for and on behalf of said corporation, being thereunto duly authorized; that he has read the above and foregoing ANSWER, knows the contents thereof, and believes the same to be true.

H. B. JONES

Subscribed and sworn to before me this 5th day of January, 1933.

[Seal] SHERMAN F. EBBINGHOUSE

Notary Public in and for the State of Washington, residing at Seattle.

Received a copy of the within Answer this 5th day of Jan. 1933.

ANTHONY SAVAGE

Attorney for Pltff.

[Endorsed]: Filed Jan. 6, 1933. [7]

[Title of Court and Cause.]

REPLY.

Comes now the UNITED STATES OF AMERICA, plaintiff herein, by its attorneys Anthony Savage, United States Attorney for the Western District of Washington, and Jeffrey Heiman, Assistant United States Attorney for said District, and for reply to the answer and affirmative defense of the defendant, alleges as follows:

I.

Plaintiff denies each and every material allegation contained in defendant's affirmative defense.

WHEREFORE, having fully replied, plaintiff prays for the relief asked for in its complaint on file herein.

ANTHONY SAVAGE
United States Attorney.
JEFFREY HEIMAN
Assistant United States Attorney. [8]

United States of America,
Western District of Washington,
Northern Division.—ss.

JEFFREY HEIMAN, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, and as such makes this verification for and on behalf of the UNITED STATES OF AMERICA, plaintiff herein; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

JEFFREY HEIMAN

Subscribed and sworn to before me this 11th day of January, 1933.

[Seal] T. W. EGGER
Deputy Clerk, United States District Court,
Western District of Washington.

Received a copy of the within Reply this 13 day of Jan. 1933.

BRONSON, JONES & BRONSON
Attorney for deft.

[Endorsed]: Filed Jan. 13, 1933. [9]

[Title of Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY.

IT IS HEREBY STIPULATED AND AGREED, by and between the respective parties hereto, by and through their undersigned attorneys, that the above matter may be transferred from the assignment and trial calendar of the Honorable Edward E. Cushman, one of the judges of the above entitled Court, to the assignment and trial calendar of the Honorable Jeremiah Neterer, one of the judges of the above entitled Court, and that said matter may be set down for hearing and trial before the Honorable Jeremiah Neterer on the 24th day of October, 1933.

IT IS FURTHER STIPULATED AND AGREED, that the above matter may be tried by the above entitled court before the Honorable Jeremiah Neterer without the intervention of a jury, such trial by jury being hereby expressly waived; and

IT IS FURTHER STIPULATED AND AGREED, that said Court may make and enter its findings of fact and conclusions of law therein.

DONE at Seattle, Washington, this 29th day of September, 1933.

ANTHONY SAVAGE
United States Attorney,
Attorney for Plaintiff.

WRIGHT, JONES & BRONSON
Attorneys for Defendant.

[Endorsed]: Filed Oct. 2, 1933. [10]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto through their respective attorneys of record, undersigned, that the attached provisions, which appear in the 1923 edition of "Regulations for the United States Coast Guard, Treasury Department," may be made, and become, a part of the record of the above entitled cause, and may be considered as having been offered and received in evidence at the conclusion of the testimony of the case and prior to submission of the same for decision.

TOM DeWOLFE

Attorneys for Plaintiff.

WRIGHT, JONES & BRONSON

Attorneys for Defendant. [11]

The following provisions appear in the 1923 Edition of Regulations for the United States Coast Guard:

Sec. 533:

> "Liberty shall be granted the crew at such times and under such conditions as the commanding officer may direct. An ample allowance is recommended in the interests of recreation and health, but when liberty is granted there shall be maintained at all times a force sufficient for ordinary emergencies."

Sec. 1389: (Sub. 4)

The following appears under the heading "The Enlisted Force":

"They shall see that the regulations concerning lights in the storerooms to which they have access are strictly observed, and that every precaution is taken to prevent fire or other accident."

Sec. 1503: (Sub. K)

"Every proper precaution shall be taken to guard against fire, and each crew shall be proficient at fire drill. The steam pumps shall be tried at fire quarters when under steam. The chemical fire extinguishers shall be tested once a year, and recharged when necessary."

(Sub. L)

"Fire buckets shall be kept filled with clean, clear water ready for use, shall be refilled at frequent intervals, and shall not be removed from their proper places or used for any other purpose than extinguishing fire."

Sec. 1563:

"The following requirements shall be complied with regarding the reports to be made to the commanding officer at 8 p. m. daily:

(a) 1. * * *

(Sec. 2) "He shall see that the fire hose are coupled and led along the decks, that the fire buckets are full of water, and that all other necessary precautions against fire have been taken."

Sec. 2054: (Sub. J)

"In each fireroom fitted for oil burning that shall be provided fire-extinguishing apparatus

consisting of steam fire hose permanently coupled and of sufficient length to reach all parts of the fireroom, a box containing about 2 bushels of dry sand with a large scoop, and portable fire extinguishers of approved types. The portable extinguishers shall be kept in the fireroom, engine room, compartments through which fuel-oil pipes pass, and in compartments adjacent to fuel-oil tanks, and shall be frequently inspected. The liquid in the foam extinguishers shall be tested at least once each month. The fireroom force shall be instructed as to the valves to close, or other procedure, in case of fire or explosion in connection with the oil apparatus."

[Endorsed]: Filed Nov. 17, 1933. [12]

[Title of Court and Cause.]

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

ANTHONY SAVAGE, U. S. Attorney,
TOM DeWOLFE, Asst. U. S. Atty.,
For Plaintiff;
WRIGHT, JONES & BRONSON,
For Defendant.

This cause having heretofore, pursuant to due assignment, been regularly tried by the submission of evidence on the part of the plaintiff and on the part of the defendants, and the court, after hearing argument by proctors and considering the same,

makes the following findings of fact and conclusions of law.

That during all the times hereinafter mentioned the plaintiff was and is now a corporation sovereign; (2)that the defendant is and at all times hereinafter mentioned, was a corporation existing by virtue of the laws of the state of Washington, that its principal place of business is in the city of Seattle in the northern division of the Western District of Washington and within the jurisdiction of this court; that the said defendant at all times hereinafter mentioned conducted a dry dock and machine works and ship repair business at its plant located in the city of Seattle for the repair and rebuilding of vessels, including the drydocking thereof;

(3) That on or about the 30th day of December, 1931, the United States Coast Guard cutter "Guard", pursuant to written [13] contract, entered into on the 18th day of November, whereby the defendant agreed to make certain repairs on the said "Guard", which contract is in evidence herein as Plaintiff's Exhibit No. 1, and contains the following provisions:

"GENERAL CONDITIONS—
FIRE PROTECTION

IT IS CLEARLY UNDERSTOOD THAT THE CONTRACTOR AGREES TO FURNISH THE VESSEL WITH AMPLE FIRE PROTECTION DURING THE TIME IN DRY DOCK OR ON THE MARINE WAY."

That the dry dock of the defendant is placed upon a floating dry dock 32 feet wide and 70 feet long,

moored on the southerly side to a wharf, the face of which extended generally in an east and west direction; that to the south side of the dry dock was an open waterway, bounded upon the southerly side by a row of poles extending in an east and west direction parallel to the wharf, against which said dry dock lay, and about 100 feet south thereof; that to the north side of said dry dock and located upon the wharf against which the dry dock lay and extending in an east and west direction at a distance of about 30 feet from the southerly side of said wharf was an open woodwork shed, designated as a joiner shop extended parallel to said dry dock to a distance of approximately 30 feet beyond the easterly end thereof; that located about 12 or 15 feet east of the easterly end of said joiner shop was a boiler room about 12 by 15 feet in dimensions, which room was in a northeasterly direction from the floating dock, a distance of about 50 feet; that the plant of the defendant was equipped with modern and sufficient fire fighting equipment for its own protection, consisting primarily of a number of chemical fire extinguishers, located at various positions throughout the plant, and three 2½ gallon chemical extinguishers separated by 20 feet intervals were hung upon the southerly side of the posts supporting the south side of the joiner shop and directly opposite said dry [14] dock and about thirty feet therefrom, and a 50-gallon chemical cart extinguisher was located upon the northerly side of said joiner shop; that said extinguishers were accessible and available for

use, but the crew of the plaintiff had not been advised thereof by the defendant nor by any other person advised or instructed in the use of such extinguishers or given authority or permission to use the same; that a canvas-covered fire hose and connection was located upon the north side of the joiner shed; that there was no fire hydrant or watermain for fire protection on the wharf adjacent to the dry dock or the "Guard", or between said vessel and the joiner shop; that there was extended from the said watermain to the dock to the wharf adjacent to the dry dock a one-inch waterpipe connection, to which there was a one-inch hose attached, which was used for the purpose for which it was designed, for washing the sides of the ships in dry dock and was used for the protection of the interior of the "Guard" while on dry dock while she was dismantled. The engines of the "Guard" while on dry dock were dismantled and her fire equipment for her own protection was rendered useless; that the length of said hose was approximately 100 feet long and capable of throwing a stream of water 60 or 75 feet; that a crew of two seamen lived on board the "Guard"; that on the morning of December 31, 1931, at about 4:30 or 5:00 A. M., a fire originated at defendant's plant, in the boiler room; that the fire was discovered by a person living on a barge moored at defendant's plant, but not in the defendant's employ. This party immediately notified the defendant's watchman, who was then in the dockmaster's office, from which point the fire was not visible, and, likewise, immediately awakened the two seamen on the "Guard". The nightwatchman immediately telephoned an alarm to

the fire department. The members of the crew went from their vessel to the wharf, took the one-inch hose, the nozzle end of which they had, [15] for protection, placed on the bow of the "Guard", turned on the water and attempted to quench the fire by turning the full force of this hose upon the fire in the boiler room. *They* they were unable to do, and the fire spread to the joiner shop in which was stored inflammable material, and about forty feet from the end of the shop was stored a dinghy belonging to the "Guard". When they were unable to stop the fire, the seamen ran and took the dinghy from the shop and carried it some distance to safety, approximately 100 feet or 125 feet, and then returned and cut the rope that anchored the dry dock to the wharf and endeavored to push the dry dock and the "Guard" upon it away from the wharf. There was a slight wind blowing the fire towards the "Guard".

The fire department did not respond immediately, and the nightwatchman again called and went to the entrance gate into the defendant's plant, and opened the gate for the fire department to enter. Usually the first equipment of the fire department would respond to this location in from three to five minutes, but on this occasion the equipment did not arrive for fifteen or twenty minutes. Neither the night watchman nor any one else used the chemical fire extinguishers or requested the seamen to do so, and the seamen knew nothing about it.

The seamen acted with all diligence and as reasonably prudent persons would under the circumstances, in the protection of their vessel. The plant of the

defendant was supplied with all necessary fire apparatus for its protection, but there was no fire protection afforded for the protection of the vessel on the dry dock, either by water supply or chemical apparatus. As a result of the fire the "Guard" was burned and damaged, and the defendant company repaired the "Guard" for the damages sustained as a result of said fire, under contract No. TCG 15520, in the sum of $3,362.00, which was paid for the repair of the United States Coast Guard cutter "Guard". [16]

The court finds that the relation between the plaintiff and the defendant was that of bailor and bailee, under bailment to the mutual benefit of both parties, in which the bailee agreed to furnish the vessel ample fire protection during the time in dry dock or on the marine way, and said bailee failed to exercise, under the circumstances, ordinary care required under the law and the said contract.

The court finds that the plaintiff has demanded of the defendant the payment of $3,362.00, and the defendant has failed and refused to pay the same.

JEREMIAH NETERER
United States District Judge.

And as a conclusion the court finds that the plaintiff is entitled to recover judgment against the defendant in the sum of $3,362.00, together with the interest thereon from the date of demand, and the costs and disbursements to be taxed herein.

Done this 26th day of December, 1933.

JEREMIAH NETERER
United States District Judge.

[Endorsed]: Filed Dec. 26, 1933. [17]

United States District Court, Western District of Washington, Northern Division.

No. 20729

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LAKE UNION DRY DOCK & MACHINE WORKS, a corporation,

Defendant.

JUDGMENT.

This matter having come on for trial before the undersigned Judge of the above entitled Court, a jury having been waived, plaintiff being represented by Anthony Savage, United States Attorney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for said District, and defendant being represented by its attorneys, Wright, Jones & Bronson, and the Court having taken the matter under advisement, and the parties having submitted the same on written briefs and the Court having heretofore filed herein its signed Findings of Fact and Conclusions of Law in favor of the plaintiff, and the Court being duly advised in the premises, now, therefore

It is hereby ORDERED and ADJUDGED that the plaintiff do have and recover judgment of and from defendant in the sum of Thirty-three Hundred Sixty-two ($3,362.00) Dollars, together with interest thereon at the legal rate from March 12, 1932, and together with its costs and disbursements to be taxed herein according to law.

Done in open court this 12th day of June, 1934.

JEREMIAH NETERER
United States District Judge.

[Endorsed]: Filed Jun. 12, 1934. [18]

[Title of Court and Cause.]

EXCEPTIONS TO JUDGMENT.

The defendant, Lake Union Dry Dock & Machine Works, a corporation, by its undersigned attorneys, hereby excepts to the judgment this day made and entered herein, allowing to the plaintiff recovery of and from the defendant in the sum of $3,362.00 with interest from March 17, 1932, and costs, and to each and every part thereof.

Dated this 12th day of June, 1934.

WRIGHT, JONES & BRONSON
Attorneys for Defendant.

The foregoing exceptions are hereby noted and allowed.

JEREMIAH NETERER
District Judge.

Copy received Jun. 12, 1934.

J. CHARLES DENNIS
U. S. Attorney
JOHN AMBLER
Asst. U. S. Atty.

[Endorsed]: Filed Jun. 12, 1934. [19]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now the defendant above named, by its attorneys, and respectfully shows that on the 12th day of June, 1934, the above entitled Court entered a final judgment herein, based upon its special findings heretofore made and entered herein, and allowed to the plaintiff a recovery against this defendant of the sum of $3,362, together with interest thereon at the legal rate from March 17, 1932, and costs taxed at the sum of $35.05.

This defendant, your petitioner, feeling itself aggrieved by said judgment, has heretofore served and does herewith file this, its notice and petition for allowance of appeal, from said decision and judgment, and the rulings of the Court thereto entered in the trial of said cause, and in the course of said proceedings, to the United States Circuit Court of Appeals, for the 9th Circuit, under the laws of the United States in such cases made and provided, and herewith petitions the court for an order allowing this appeal.

WHEREFORE, your petitioner prays that said appeal to said Court be allowed, and that an order be made, fixing the amount of cost and supersedeas bond, conditioned as provided by law, and that upon the giving of such bond as may be fixed herein, all other and further proceedings may be suspended until the [20] determination of said appeal by the said Circuit Court of Appeal.

WRIGHT, JONES & BRONSON

Attorneys for defendant and appellant.

Copy of the foregoing notice and petition for allowance of appeal received this 12th day of July, 1934.

J. CHARLES DENNIS
JOHN AMBLER
Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 12, 1934. [21]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the defendant above named, and in connection with its appeal in the above cause which has been allowed, assigns the following errors, upon which it relies to reverse the judgment herein, as appears of record:

I.

The making and entry of that portion of finding number 3, which recites that the crew of the plaintiff had not, by the defendant, nor by any other person, been advised or instructed in the use of such fire extinguishers, or given authority or permission to use the same, upon the ground that the same are unsupported by and contrary to the evidence in the case.

II.

The making and entry of that portion of finding number 3, reciting:

> "That there was no fire hydrant or water-main for fire protection on the wharf adjacent

to the dry dock or the Guard, or between said vessel and the joiner shop;"

upon the ground that the same is unsupported by and contrary to the evidence in the case.

III.

The making and entry of that portion of finding number 3, reciting that the fire equipment carried by the Guard for its own protection was rendered useless during the time it was in dry dock, except as to the water pumps of said vessel; upon the [22] ground that the same is unsupported by and contrary to the evidence in the case.

IV.

The making and entry of that portion of finding number 3, reciting:

"The seamen acted with all diligence and as reasonably prudent persons would under the circumstances;"

upon the ground that the same is unsupported by and contrary to the evidence in the case.

V.

The making and entry of that portion of finding number 3, reciting:

"That there was no fire protection afforded for the protection of the vessel on the dry dock, either by water supply or chemical apparatus;"

upon the ground that the same is unsupported by and contrary to the evidence in the case.

VI.

The making and entry of that portion of finding number 3, reciting that:

> "The court finds that the relation between the plaintiff and the defendant was that of bailor and bailee, under bailment to the mutual benefit of both parties, in which the bailee agreed to furnish the vessel ample fire protection during the time in dry dock or on the marine way, and said bailee failed to exercise, under the circumstances, ordinary care required under the law and the said contract;"

upon the ground that the same is contrary to and unsupported by the evidence in the case, and law applicable thereto.

VII.

The failure and refusal of the Court to make and enter the following portions of defendant's proposed findings of fact, filed herein upon December 26, 1933, or the substance thereof, as requested in said proposed findings, and in defendant's exceptions and request for additional findings filed herein upon the 30th day of December, 1933, in the following respects: [23]

> (a) "That said vessel was required to carry, and did carry, pursuant to Coast Guard Regulations in evidence herein as defendant's Exhibit A-6, fire equipment for her own protection, consisting of extinguishers, sand in boxes, water in buckets, * * *"

(b) "That the crew of two men left on board were considered by *by* the plaintiff and its commanding officer to be adequate and sufficient to care for the safety of said vessel in any emergency that might ordinarily arise, and also were considered sufficient to move the dry dock, if necessary, and to extinguish any fire, or take care of anything out of the ordinary which would occur on board said vessel."

(c) "That the commanding officer of said vessel considered that the hose furnished by the defendant, and the water supply, to be made available, was sufficient to take care of a fire on board said vessel."

(d) "That at the time the members of the crew went from the vessel to the wharf, the fire was confined to the inside of the boiler room, and the flames were just beginning to break through the roof, and that the members of the crew endeavored for a period of five to seven minutes to put out the fire in the boiler room."

(e) "That the dock was pushed and drifted out in a south-westerly direction into the open channel, out of range of the fire, and the crew thereupon extinguished any flames remaining by the use of buckets and water dipped from alongside the dock."

(f) "That at no time did the crew use the hose furnished by the defendant upon said vessel; that had said hose been kept on board said vessel, and used for the protection of said vessel, it would have prevented or substantially

lessened the damage that said vessel suffered from the fire."

(g) "That defendant's watchman endeavored to reach the fire hose upon the northerly side of the shed upon the wharf adjoining the vessel, but that by reason of the draft and the heat carried under the roof, he was unable to do so, and was likewise unable to make use of the chemical cart above referred to."

(h) "That the dry dock on which the vessel rested, was capable of being readily moved by two men, particularly in the case of an assisting breeze; that at the time of such fire there was a light breeze from the north or northeast, blowing from the fire towards the dry dock; that the crew of said vessel did not undertake to move said dock for at least fifteen minutes after they were awakened, and went on board the wharf and began fighting the fire; that had they undertaken to move it at once, or even at the time they ceased using the hose and went to carry out the dinghy, they could have moved it out of reach of the fire in time to have prevented the damage that occurred to the boat, or a very substantial part thereof; [24] that there was nothing to prevent the crew from moving said vessel immediately they were awakened, and went on deck;"

on the ground that the said proposed findings, and each of them, were established by the uncontradicted evidence, and material to the issues in the case.

VIII.

Failure and refusal of the Court to make findings upon the following propositions as proposed and requested in defendant's request for additional findings, filed herein upon the 30th day of December, 1933, or the substance thereof, as follows, to-wit:

(a) That the purpose of the fire protection clause in the contract between the plaintiff and defendant, was to furnish to the vessel similar fire protection to that provided by her own equipment when not out of commission, and that such protection was furnished by the hose and water supply provided for said vessel.

(b) As to whether or not the commanding officer of the Guard considered and accepted the hose furnished to the vessel as being adequate and sufficient for its protection.

(c) Whether or not, if the hose kept on board the vessel had been used on the vessel, it would have prevented or substantially lessened the damage which occurred.

(d) What period of time elapsed from the time that the crew of the Guard was awakened and available for duty, to the time that they commenced moving the dry dock upon which the Guard rested, away from the dock.

(e) Whether or not the damage to the Guard could have been prevented, had the crew of the Guard cut it loose and pushed it away from the dock;

1. Immediately upon responding to the alarm and endeavoring to put out the fire;

2. At the time of ceasing efforts to put out the fire, and before moving the dinghy.

(f) That at the time of the occurrence of the fire, the vessel was in the possession and under the control of the plaintiff, and not in the exclusive possession and control of the defendant;

on the ground that said propositions were, and each of them is, a material issue involved in the case, established by competent and uncontradicted evidence therein. [25]

IX.

The making and entry of conclusion of law to the effect that the plaintiff is entitled to recover judgment against the defendant in the sum of $3,362.00, together with interest and costs, or in any sum whatsoever.

X.

The making and entry of judgment herein, awarding judgment in favor of the plaintiff and against the defendant, for the sum of $3,362.00, with interest and costs.

WRIGHT, JONES & BRONSON
Attorneys for Defendant.

Copy received this 12th day of July, 1934.
J. CHARLES DENNIS
JOHN AMBLER
Attorneys for Plaintiff

[Endorsed]: Filed Jul. 12, 1934. [26]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING BOND.

Upon consideration of the petition this day submitted herein by the above named defendant;

IT IS HEREBY ORDERED that an appeal be allowed to said defendant from the judgment herein made and entered upon the 12th day of June, 1934, awarding judgment in favor of the plaintiff and against the defendant for the sum of $3,362.00, with interest thereon at the legal rate from March 12, 1932, and costs in the sum of $35.05, and that upon the filing of a supersedeas and cost bond upon appeal in the sum of $4000.00, that further proceedings herein be stayed pending the decision of the United States Circuit Court of Appeals for the Ninth Circuit, upon this cause.

Done in open Court this 12 day of July, 1934.

JEREMIAH NETERER
Judge.

Copy received this 12th day of July, 1934.

Approved as to form and notice of presentation waived:

J. CHARLES DENNIS,
U. S. Atty.
JOHN AMBLER,
Asst. U. S. Atty.
Attorneys for Plaintiff.
OK TOM DeWOLFE.

[Endorsed]: Filed Jul. 12, 1934. [27]

[Title of Court and Cause.]

ORDER RESPECTING TRANSMISSION OF EXHIBITS.

Upon motion of the defendant herein, it is hereby ORDERED that the exhibits herein be not incorporated in the bill of exceptions or transcript of record, and that the original exhibits designated by either party as necessary to the appeal herein, be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Done in open Court this 12 day of April, 1934.

JEREMIAH NETERER
Judge.

Copy received this 12th day of July, 1934.

Approved as to form and substance and notice of presentation waived:

J. CHARLES DENNIS, U. S. Atty.
JOHN AMBLER, Asst. U. S. Atty.
Attorneys for Plaintiff.
OK TOM DeWOLFE.

[Endorsed]: Filed Jul. 12, 1934. [28]

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That LAKE UNION DRY DOCK & MACHINE WORKS, a corporation, as Principal, and SAINT PAUL-MERCURY INDEMNITY COMPANY OF SAINT PAUL, a corporation, duly incorporated under the laws of the State of Delaware, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the UNITED STATES OF AMERICA, a corporation sovereign, plaintiff above named, in the full and just sum of Four Thousand Dollars ($4,000.00), for the payment of which well and truly to be made we do hereby bind ourselves, and our and each of our successors and assigns, jointly and severally, by these presents.

The condition of the above obligation is such that, whereas the said Lake Union Dry Dock & Machine Works, a corporation, defendant in the above entitled action, has appealed to the Circuit Court of Appeals, for the Ninth Circuit, from that certain judgment entered herein on the 12th day of June, 1934.

NOW, THEREFORE, if said Lake Union Dry Dock & Machine Works, a corporation, as appellant, shall prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good,

then the above obligation shall be void, else to remain in full force and effect.

Dated this 18th day of July, 1934.

LAKE UNION DRY DOCK & MACHINE WORKS, a corporation,
By WRIGHT, JONES & BRONSON
Its Attorneys
(Principal)

[Seal] SAINT PAUL-MERCURY INDEMNITY COMPANY OF SAINT PAUL
By L. S. STEWART
(Surety) Attorney-in-Fact.

Bond approved this 26th day of July, 1934.

JOHN C. BOWEN
Judge.

[Endorsed]: Filed Jul. 26, 1934. [29]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

This matter coming on regularly for hearing upon the application of Lake Union Dry Dock & Machine Works, a corporation, for an extension of time in which to file a bill of exceptions, and the court having read the stipulation of the parties hereto, and being duly advised in the premises, it is now, therefore,

ORDERED, ADJUDGED AND DECREED that the time for filing a bill of exceptions in the above

matter be and the same is hereby extended from the first day of July, 1934 to and including July 15, 1934.

Done in open court this 28th day of June, 1934.

JEREMIAH NETERER
District Judge.

[Endorsed]: Filed Jun. 28, 1934. [30]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore, to wit, on October 24, 1933, at the hour of ten o'clock A. M., the above entitled cause came on regularly for trial before the Honorable Jeremiah Neterer, United States District Judge, sitting without a jury, same having been waived by stipulation of counsel, the plaintiff appearing by its attorney, Tom DeWolfe, Assistant United States Attorney for the Western District of Washington, and defendant appearing by its attorney, H. B. Jones of Messrs. Wright, Jones & Bronson.

WHEREUPON the following proceedings were had and testimony given, to wit:

TESTIMONY OF J. H. SNYDOW.

J. H. Snydow, sworn as a witness for the plaintiff, testified as follows on

Direct Examination by Mr. DeWolfe

I am warrant boatswain in the United States Coast Guard being assigned on December 31, 1931 to

(Testimony of J. H. Snydow.)

the United States Harbor cutter Guard which is the subject matter of this action. She is a vessel 67 feet, 6 inches long and 52½ tons displacement. On December 31, 1931 she was on the plant of the Lake Union Dry Dock & Machine Works being overhauled and having repairs made. Plaintiff's Exhibit number one is signed by me and is the con- [31] tract under which the work was being done. (Plaintiff's exhibit #1 introduced in evidence.)

I was at home when the fire broke out. I live out in the North End. I had left the boat about five o'clock the previous evening. I was officer in charge.

(Two drawings, one prepared by plaintiff and one by defendant, showing the layout of the plant where the fire occurred, were received in evidence as plaintiff's exhibit #3.)

The Guard was resting on a floating dock, marked exhibit A on plaintiff's exhibit #3. (Witness identified boiler room, storeroom, joiner shop, lumber shed and floating dock). The floating dock was moored about fifty feet from the boiler room where the fire originated, alongside a wharf on which there was also located a joiner shop and lumber shed. The floating dock drifted out approximately forty feet. It was made fast by lines. The vessel was still fast to the wharf when she burned. There were about one hundred fifty feet of one-inch hose connected to a water plug located on the wharf just forward of amidships of the Guard. "We used it for our own protection on board the boat and we leave the end of the hose on board the Guard every night for our

(Testimony of J. H. Snydow.)

own protection". The hose was connected when I left the evening before, the nozzle was just aport the pilot house. The Guard's boiler and water pump were torn down and out of commission at the time. Plaintiff's exhibit #4 is a transcript of the log of the Guard on December 29th and 30th made by me and written down at the time.

Mr. JONES: I will not object to the exhibit on the ground that it is a copy. I assume that if we want to see the original we can do so. I do not think it is proper evidence. The boat was not under way. It seems to [32] me it is hearsay. I will not object on the ground that it is not the best evidence but I will object on the ground that it is hearsay and not properly admissible.

I got to the fire about six o'clock, over an hour after the fire started. The fire started about five o'clock in the morning. The Guard was approximately fifteen or twenty feet from the buildings and the shed. The shed was something like ten to fifteen feet from where the fire began. There was no fire protection when I arrived. There was a chemical cart in the machine shop. The machine shop was locked every night when I was there. The watchman, as far as I know, had the key. I never tried to get into the place and found it locked. The machine shop was right at the end of the house or shed that burned. According to our log, there was a southeast wind in the morning. As I remember it, that morning there was a very light wind.

(Testimony of J. H. Snydow.)

(Government's exhibits Nos. 2 and 5 offered in evidence.)

These are the amounts paid for repairs and the damage claimed by the government. There were two men on the boat during the evening, Henry Schafer, chief machinist's mate in charge of the engines, and boatswain's mate, first class, Louis LaPlace. Inspections are made on boats in the matter of maintenance and operation by an inspection board once a year or oftener. Plaintiff's exhibit #6 is a report of inspection held on the 19th day of December, 1930, made by Lt. John W. Kelleher and Lt. Henry C. Jones.

(Thereupon plaintiff's exhibit #6 was received in evidence.)

It is a part of the record of our boat. Page 11, question 14, refers to fire control. Two of the crew were required to remain on board at night. That was approved [33] in Washington. Exhibit #6 was made by the inspector in charge under the direction of the Board.

Rule 685 of the Regulations of the United States Coast Guard, identified by the witness, reads as follows:

> "The inspector in chief shall have charge of and be responsible for the proper performance of the duties assigned to the office of the inspector in chief and shall be assisted by boards of inspection and by certain commissioned officers as may be detailed by headquarters. The

(Testimony of J. H. Snydow.)

senior officer remaining thereat and regularly attached to the office of the inspector in chief shall act as the inspector in chief."

Section 686 reads as follows:

"He shall, in the discretion of the commandant in charge, have custody of the books of the record and correspondence pertaining solely to his office."

Section 687 reads:

"It shall be the duty of the office of the inspector in chief to inquire into the condition and operation of the material and personnel of the service and record with strict impartiality in regard to all irregularities and deficiencies that may be discovered and to make such recommendations as may appear practical for the correction of any defects that may be observed."

Under the same heading, Section 688-G, appears the following:

"* * * the scope of inspection shall include all that pertains to the following: the protection of vessels, boats and buildings against fire and other damages."

As far as the record of our boat is concerned there was never any objection as to the number of men kept on the Guard.

I did not see any watchman around when I came down to the fire. He may have been around some

(Testimony of J. H. Snydow.)

other part of the dock but not at that time nor did I see him at any time or place. The chemical cart was not out. Some em- [34] ployees of the Lake Union Dry Dock & Construction Company got there when I got there at six o'clock.

Cross Examination by Mr. Jones:

I was assigned on the Guard the 15th day of March, 1930. The vessel did not happen to be in the plant for repairs when I was in charge of her. I have been on other boats that have been in the Lake Union Dry Dock for repairs in 1925 but not since then. I drew the map, plaintiff's exhibit #3, myself. It is not undertaken to be drawn to scale. The distance that the dry dock carrying the vessel drifted to the south side was only forty feet. I did not measure it. As I remember, the boats moored along the piling were longer than thirty-five or forty feet. I think there were three or four halibut fishing vessels, and they were, I should judge, about fifty feet long. When I got there the dry dock carrying the Guard was in this position (indicating). The two men on watch told me they had cut it adrift. I only know what was reported to me. The Guard was burned in quite deep. There were some streaks of scorching in the engine room. The vessel was charred deep enough to spoil the planking. It had to be replanked. I think there is a provision in our regulations that we shall keep on board at all times a sufficient number of men to handle these boats in any emergency that may arise. In my judgment two

(Testimony of J. H. Snydow.)

men were sufficient to handle the vessel as she rested in dry dock and to move the dry dock if necessary. I did not think we had the right to move the dry dock. I considered two men sufficient to extinguish any fire or to take care of anything out of the ordinary that would occur on board the Guard. I think two [35] men were sufficient to cast the dock loose and guide the dock under the circumstances that existed. I do not know of any reason why two men on board could not have cast off the line and immediately move the dock away from the scene of the fire. Ordinarily we have fire hose for fire protection on the boat and have our own pumping equipment. We use 1½ inch hose. I do not know what pressure. While lying at the dock we had a hose of the Lake Union Dry Dock available in case of fire. It was connected to the hydrant that was right on the face of the dock. I am not acquainted with the character of the chemical extinguisher or extinguishers at the plant.

Redirect Examination by Mr. DeWolfe:

We could not operate our water system when on dry dock.

Recross Examination by Mr. Jones:

The control valve for the hose of the Lake Union Dry Dock Co. that was connected on the wharf was right near the connection. I tried it every day and it was working all right and there was water on the line. I used the water practically every day. There was a strong pressure.

(Testimony of J. H. Snydow.)

Redirect Examination by Mr. DeWolfe:

It was a one inch hose used to wash the bottoms of vessels to be painted on dry dock. It was a one inch canvas and rubber hose, not such a hose as is ordinarily used for fire protection.

Recross Examination by Mr. Jones:

The fire hose used on ships is usually a cotton [36] covered hose. This hose took all the pressure I put on it.

Redirect Examination by Mr. DeWolfe:

I considered that the hose would carry water enough to take care of a fire on board the Guard.

Witness excused.

Plaintiff's exhibit #7 was introduced in evidence showing the damage to the boat after the fire in the sum of $3362.00. It shows a list of damages after a marine survey was made by the Marine Board of Underwriters and a lieutenant of the United States Coast Guard.

TESTIMONY OF LAPLACE.

Louis LaPlace, sworn as a witness for the plaintiff, testified as follows on

Direct Examination by Mr. DeWolfe:

My name is Louis LaPlace. I am bos'ns mate on board the Coast Guard Harbor cutter Guard and

(Testimony of Louis LaPlace.)

was so employed in that capacity on the 30th day of December, 1931. The fire occurred about four o'clock in the morning. I was asleep at the time in the cabin in the after part of the ship. I was awakened by someone hollering "fire" about 4:15 o'clock in the morning. There was no watchman around that I know of at the time I was there. When I awoke I found the boiler room was on fire. It was about fifty feet away from the boat. The fire got over to our boat nearly instantly. As soon as it got started it went over quickly. Schafer, chief machinist, was with me. I was there first. I went on board to get Schafer so he could help me. He was asleep. Right away I went up and got a hose on our deck and tried to put the fire out on the [37] company's dock. It was the same hose the witness Snydow testified he hooked up the night before. The fire was blazing through the building at that time and it did not do us any good. There was not sufficient pressure to put the fire out so Schafer and I went and got the dinghy and took it out of the shed and took it out on to the dock and by the time we got back the dock was blazing. The shed was approximately fifteen feet from the dock and about fifteen feet from the boat. It was a little above the level of the boat. The boat was in dry dock and this shed was on top of the dock. The flames that caused the boat to ignite came from all over. Burnt wood was coming out. They just popped up in the air and came down. Our engine was torn down, and we could not pump any water

(Testimony of Louis LaPlace.)
and we were on the dry dock. There were no hooks around or oars which we could use to shove the dry dock out. We went aboard, took the skiff down and went in to the shed and put it on the dock and tried to push the floating dock away. I cut the mooring lines with Mr. Schafer's help. I got burned on the back of my neck. We got the dry dock unloosened. Schafer and I were on the dry dock—it did not drift far away. The end was facing the street. It just drifted across the small passageway, approximately sixty feet, I would say. I could not get back after that—it was too hot for me. I would not say whether the hose burned up or not. The ship was on dry dock and we dipped water out of the lake and put it on the deck. Schafer would dip the water out and I would put it on the deck and we finally got the fire out. I did not see any watchman around that night and did not receive help from anyone. The fire department put the fire out on the Lake Union Dry Docks. The [38] fire boat was playing on the machine shop. They had water turned on to keep the machine shop cooled off. I would say that hose was about one inch. When I woke up about four o'clock in the morning the fire was in the boiler room coming through the top and through the sides, too. The flames were going up fifteen or twenty feet in the air. About fifteen minutes later the flames reached the boat where I was. The fire was not blazing in the open dock. The buildings were pretty close together. You could not see it on account of the smoke but all of a sudden

(Testimony of Louis LaPlace.)

it swept across to our boat. I do not know just how long before the flames got to our boat but I would say around fifteen or twenty minutes at the most. During those fifteen or twenty minutes we were trying to get the floating dry dock away by cutting the lines and pushing it out. As soon as I got the skiff out of the shed and took it back again, I started to try to cut the lines. When I first awakened, I tried to put the fire out over in the boiler room and when I could not do that, I took the skiff out on the dock. The dry dock was on fire before the Guard was. Those posts on the side and the stanchions were afire. They caught fire as soon as the fire got there —about fifteen minutes. The dry dock was on fire a couple of minutes anyway before the Guard was on fire. The flame was getting pretty hot.

Cross Examination by Mr. Jones:

I do not know who it was that was hollering "fire" that awakened me. The first was making considerable noise when I woke up. I heard the yell and the cracking noise about the same time. I went out on the boat and saw the boiler room had flames coming out of the top and sides. It [39] was possibly ten to fifteen feet between the boiler room to the adjoining shed on the west. I took the hose which was attached to the hydrant on the dock off our ship and tried first to put the fire out. I only got across this far—it was too hot. This hose was the hose of the Lake Union Dry Dock Co. which was furnished for our own protection. I got to within about fifteen or twenty feet of the

(Testimony of Louis LaPlace.)

boiler room with the hose. It was already attached. Mr. Schafer was with me. We tried to put the fire out in the boiler room with this hose for about five to seven minutes. The hose did not have much effect on the fire. There wasn't very much pressure. I could throw the water with the hose twenty-five or thirty feet. We could get it on to the fire all right. Mr. Schafer was with me all the time. Then we left and came to our dinghy which was stored in this shed (which witness marks "X" on the drawing). The dinghy is a life boat. We took it past here and we put it right about here (indicating). One man can drag the dinghy and both of us took it. I suggested taking it out. It took us about three minutes. I jumped on to the dry dock and cut the forward line. We pushed it off with our hands. We both tried to push her away. The fire was on the deck, the canvas covering the engine room. It was on the side of the wheelhouse and the mast was on fire. We put the fire out dipping water from the lake with a bucket. When we came to take the dinghy out, we dropped the hose. It was not necessary to play the hose on our boat at first. I did not think our boat was in danger at first. At the time we came back here and came to get the dinghy I knew it was in danger. We got the dinghy because I thought we could save both of them. I thought we had time to save the dinghy and also to shove this away. As soon as we got the boat loose, the forward end

(Testimony of Louis LaPlace.)

went into the channel. We pushed it away. It went [40] very slowly. It was heavy. It kind of drifted across there, sixty feet at the most. The stern of our boat was still up against the dry dock. The flame was down there (indicating). The stern was here (indicating). The fire was confined here (indicating). When we swung the forward end around, even with the after end made fast, we were far enough away from the fire to work on the fire. By this time the fire department was there. I was on board the Guard when the fire department arrived. The dry dock was pretty close to the dock. There was another dock there that would prevent the dry dock from going farther across. The front end of the dock was against the other side and the other end near the other dock just as far as it could have gone. The dry dock was catty corner across. The front end moved faster. I move it out first. It moved while I was cutting the other rope. From the place where the fire occurred to the closest boathouse on the other side of the waterway was sixty to seventy feet. There was some piling that the boats were made fast to. The boats so moored were headed into the dock. The first department arrived about 4:30 o'clock I imagine. Something like twenty to twenty-five minutes after I awoke. I was on board the boat trying to get the fire out when the fire department arrived. That was after I had gone over to the boiler room and tried to get the fire

(Testimony of Louis LaPlace.)

out and could not do so and then brought this boat over. [41]

Q. (By Mr. Jones, continuing) If you had cut your boat loose immediately you would have avoided your damages.

A. I did not figure when I first stood there that it would burn the boat up. It was not any of my particular business to move the dry dock anyway.

Q. If you had cut the boat loose immediately you would have been far enough away not to be burned?

A. We could only get over here (indicating).

Q. You would not have been burned here (indicating)?

A. The stern might have got on fire.

Q. Well, at any rate, if you had cut her loose immediately she would have had plenty of time to have drifted across here (indicating) before the fire got too hot.

A. We probably could have if we had pushed it away right away.

The COURT: If he had sat up all night, it would not have burned. If he had been awake before the fire started it would not have burned.

Mr. JONES: That is true.

The COURT: The question is, what would an ordinary person under these circumstances have done.

Mr. JONES: That is the idea.

(Testimony of Louis LaPlace.)

Q. (By Mr. Jones, continuing) Didn't it occur to you to move the floating dock as soon as you saw the fire?

The COURT: He thought he could put the fire out.

The WITNESS: We thought we could put the fire out.

Q. (By Mr. Jones, continuing) Who was in charge of the boat?

A. Schafer was in charge of the engine room and I was in charge of the deck at the time.

Q. Did it occur to you to turn the hose on the Guard so as to keep it from catching fire?

A. No, sir.

Q. This hose that you used, that is the Lake Union Dry Dock hose?

A. Yes, sir. [42]

Redirect Examination by Mr. DeWolfe:

The dry dock is about 32 feet by 70 feet.

Witness excused.

TESTIMONY OF HENRY SCHAFER

Henry Schafer, sworn as a witness for the plaintiff, testified as follows on

Direct Examination by Mr. DeWolfe:

My name is Henry Schafer. I am employed as chief machinist's mate on the Guard and was so employed on December 30, 1931. I was awakened

(Testimony of Henry Schafer.)

about four o'clock in the morning of that day. When I got up the fire was burning on the dock about fifty feet catty cornered from where we laid. The fire was in the boiler room on the dock. Mr. LaPlace was with me. He grabbed the hose and we tried to put the fire out. It got so hot, he said to me, "We had better take the life boat out of the shed before it burns up", and when we got back we tried to get the boat away from the dock. We tried to shove the boat away. We only had our hands. There were no boat hooks around on the float. The hose we used was about one inch in size. There was no other fire protection around the hose that I saw. When I got up the fire was burning right aft of [43] the boiler room where they keep steam. It was quite a big fire. We could not get so very close because the hose would not reach, possibly ten or fifteen feet, I should judge. We put all the pressure on the hose and the water reached to where the fire was. It had not yet broken through and was still boarded up so I do not know whether the water reached the fire itself which was inside the building. It was not long before it got out of the building. We just threw the water on the outside until the flames got out of the building. When the flames broke out, it got so hot we could not stand it any longer and we went to get the dinghy. There was no fire on the Guard then. The fire occurred on the Guard not very long after we got the dinghy. I do not know exactly how long it was. I saw the stanchions were burning and those tarpaulins which cover up over

(Testimony of Henry Schafer.)

the hatches were on fire. They were blazing and we threw them off. We tried to shove the boat out. The hose was no good to us and you could not reach it with a hose. And then what fire was burning we took and put it out by dipping water from the lake. The planking on the side was scorched and burned. It was all black and had to be replaced.

Cross Examination by Mr. Jones:

The hose was about one hundred feet long. I was with LaPlace when he tried to put the water on and know he had the hose squirting at it. It was connected to a faucet right astern of the dry dock where the float was tied up to the wharf. There was just one place where there was a fire hydrant. We carried the dinghy out of the shed about one hundred feet right alongside of the machine shop. There was no fire on the Guard [44] when we took the dinghy out. We did not think of the Guard being in danger until it broke through. There was just a little wind, kind of off from the Guard, more towards the buildings where there was a fire. I did not pay any attention to the wind. It got so hot I could not stand to push the floating dock from the dock. If we had started at once to cast the Guard from the dock perhaps we could have gotten it away without damage, but we did not think of it. Mr. LaPlace said we had better get the dinghy out. By that time the fire was

(Testimony of Henry Schafer.)
through the shop. One of these big scows is very hard to push out especially if you haven't anything to push it with. If the dinghy was in danger the Guard might have been in danger. The dinghy was down in the shed something like twenty feet from the fire. The dinghy was in the shed right across from the Guard on the dock. If the fire had gotten to the dinghy it would have tended to go to the damage of the Guard. It went so fast you did not have time to think. I did not see any chemical extinguishers around the plant nor in the shed where the dinghy was.

Redirect Examination by Mr. DeWolfe:

There was some sawdust in the joiner shop. It was all scattered around. I could not tell you how much.

Witness excused.

(Government rests)

Mr. JONES: I move for the dismissal of the government's case, on the ground that there is no showing upon which to predicate liability against the defendant. The ordinary rule, of course, even considering this as a bailment, when it develops that the failure to return the article bailed or that damage has resulted from an occur- [45] rence which is ordinarily attributable to negligence, such as fire, there is no presumption of fault on the part

of the bailee, and it is incumbent upon the bailor to go further and show that the fire was attributable to the negligence of the bailee.

The COURT: Let me ask this. The contract, I believe, is admitted?

Mr. DeWOLFE: Yes, sir.

The COURT: The motion must be denied.

Mr. DeWOLFE: I would like to renew my offer of this portion of the log.

The COURT: Let it go in.

Mr. DeWOLFE: This is Government's exhibit No. 4.

(Whereupon Government's exhibit No. 4 was introduced in evidence.)

Mr. JONES: I would like an exception to the Court's ruling.

The COURT: Noted.

Mr. JONES: I think I should go further and amplify my motion. That in addition to the matter of presumption, on the matter of the law of bailment, I think it affirmatively appears from the showing that the plaintiff has made that the damage could have been prevented by the exercise of reasonable precaution on the part of the men on the ship and for that reason the proximate cause of the damage is the failure to take due and proper care to minimize the damage. I think that affirmatively appears.

The COURT: Upon that phase of the question, I must say: I do not think your position is well taken. I think, so far as a reasonable conduct on

the part of these seamen, they showed about as contiguous conduct as could possibly be conceived. They seemed to act in a rightful sort of way, [46] just what reasonable men would be presumed to do. The first thing they did was to fix this hose and they tried to put the fire out, and when they saw they could not do that,—there was material on the dock, and if there was any wind it was away from the Guard, and they could reasonable conceive the idea that this was the thing that was in danger, and that was the first thing they did. I think they did exactly the same thing that an ordinarily intelligent person would do, and they came back and got the row boat. I think, as far as these seamen are concerned, they exercised more consecutively reasonable steps than is usually developed, and I think they showed a splendid presence of mind. So that on that phase of your motion, there is nothing to your motion.

Mr. JONES: I would like an exception and will submit proof on that matter of the direction of the wind.

The COURT: Allowed. Proceed with the defense.

TESTIMONY OF OTIS CUTTING.

Otis Cutting, sworn as a witness for the defendant, testified as follows on

Direct Examination by Mr. Jones:

My name is Otis Cutting. I am vice president and general manager of the Lake Union Dry Dock

(Testimony of Otis Cutting.)

Company and have been connected with the Company ever since it has been located at its present location which is about thirteen years. Referring to plaintiff's exhibit #3, the sheet marked "B" with colored markings, labeled Lake Union Dry Dock and Machine Works, there is an open water way between the wharf to which the dry dock was moored and the wharf to the south of it, of about one hundred fifty feet. It ex- [47] tends about one hundred and fifty feet from the street, of which about fifty feet of the southern portion was occupied by vessels, leaving about one hundred feet of clearance. You have one hundred feet of clearance from the face of the wharf where the United States Coast Guard vessel was in dry dock to the boats moored here (indicating). The boiler shop was about fifty feet from the face of the dock where the Coast Guard boat was located. The dry dock with the Guard on it lay at the position marked on Exhibit #3, "c". The boiler room where the fire originated was about fifty or sixty feet from the Guard, about thirty feet from the edge of the wharf and about fifteen feet from the adjoining shed. I was there before the fire was out. The shed referred to was what we call a mill and there was some lumber stored above. In the clear space in the shed were berths for building boats. The dinghy was stored in the middle of the shed, or in the middle bay. It was two bays over from this end of the house. The dinghy was taken by the two men beyond the machine shop about one hundred twenty feet from

(Testimony of Otis Cutting.)

where it was stored. We have a chemical extinguisher in each one of these bays. These bays are twenty feet wide. There are five posts and a chemical extinguisher at each post. These are marked with the letter "X". The extinguishers were on the outside of the shed and three of them were there, each of two and one-half gallons capacity. They are operated by turning them over and the acid in the contents generates the gas. I presume that the Guard was advised they were there. Most people know how to use them. The extinguishers are primarily for the protection of the plant. They have prevented fire many times. We also had a cart extinguisher here which I will mark with a capital [48] "Y". It holds fifty gallons and was not locked up. It always stands there. I do not think the Guard was advised of that. This was likewise for our plant. We depended upon the chemicals because they are far more efficient than water as fire protection especially for boats by the dock. There are chemical extinguishers all over the plant. They are still there. They are of two and one-half gallons capacity. We had a generous number of extinguishers all over the plant. They have saved fire on several occasions, and one of those fire extinguishers has put out fire just like magic. I have operated those extinguishers and they are more effective than a two inch stream of water. Our water system consists only of a small hose used for washing down boats. It is city water and normally of one hundred twenty-five pounds pressure. It would throw water farther than twenty

(Testimony of Otis Cutting.)

or twenty-five feet. It will throw water at least sixty or seventy feet—a one inch stream of water. That is, a one-inch inside diameter. The hose could squirt from one dock to the other and the dock is forty feet long. On the morning of the fire I was called about five o'clock and it must have been 5:30 o'clock when I got down there. What wind there was, was from the north and this building fifteen feet away was not touched. The fire was toward the Guard and kind of from the north. One man can move these floating docks. I have moved them alone all over the plant. I did it by taking a pole and pushing them. In this case the wind would have moved the dock away without any pushing in this particular case. At the time I got there the dry dock had been cut entirely adrift and had been swung out something like this (indicating) according to my recollection. I think the stern was still moored to the dock. I am not clear about [49] that. I did not get over that part. I did not get to see clearly just what was over there. I do not know whether it was across so that it was against the piles or boats on the other side of the waterway.

Q. What is your practice with relation to maintaining a fire in this boiler room and the conditions under which fire is maintained, or precautions that are taken about it? What is the occasion for any fire at all?

The COURT: Is that material?

Mr. JONES: I do not know. I am not quite sure what counsel's contention is. If it is presumed that

(Testimony of Otis Cutting.)

the fire arose from negligence, if that is his contention.

The COURT: I do not think the court is interested. The question is whether sufficient precaution was taken after the fire broke out.

Mr. JONES: If Your Honor does not regard that as material I will withdraw it.

The COURT: Is that the idea, Mr. DeWolfe?

Mr. DeWOLFE: I think that is right. [50]

The plant maintained a watchman, Mr. Clark, and he was there that night. We have had fire originate in the boats and sheds quite a number of times before. The fire department that would first respond to our plant would be the one on Fairview Avenue. I do not know what equipment is at that station. From previous experience it takes the fire department about four minutes ordinarily to get there in response to a call.

Cross Examination by Mr. DeWolfe:

The fire department did not get there that night in about four minutes. Mr. Clark has not been employed by our company for about one and one-half years. I only know he was present on the night of the fire by hearsay. I did not see him personally. The chemical cart is only kept inside in cold weather. It was not in the shed at seven o'clock in the morning. It was out on the wharf. When it goes down to the danger point, twenty-five or thirty degrees, the fifty-gallon chemical cart is kept inside. It is put under cover. On the night in ques-

(Testimony of Otis Cutting.)

tion it was raining. The cart is locked up in the machine shop in extremely cold weather. The watchman had a key for the machine shop that night. There is always some sawdust in the joiner shop. We had that kind of work. We always keep a number of poles and hooks around to shove the barges off. They are kept where the ships are raised and lowered. One man can push the dry dock. It is 32 feet by 72 feet. [51]

(Plaintiff's exhibit #8 introduced in evidence.)

The two and one-half gallon chemical tanks would not have done a great deal of good after the fire got out of the boiler shed. If they had used such a tank before the fire got out of the boiler room it would have done good. If our watchman could have gotten to the fire before it was too hot he could have done a great deal. Of course, as soon as he saw the fire he could only do one thing at a time. There are three chemical extinguishers twenty feet apart. There are two others on the main building about seventy-five feet from the boiler house. One of these was about seventy-five feet from the Guard and the other about one hundred feet. They are placed all over the plant. We have nine altogether, three in this place, two in the main office building, the rest of them were in the shop for use in general work, locked up that night.

Redirect Examination by Mr. Jones:

About seven o'clock in the morning, on the wharf, about daylight, on hearing a report that the chemi-

(Testimony of Otis Cutting.)

cal cart was locked up, we went out to see if it was locked up and we found it full of cinders. From my examination I found that it had not been locked up. I do not know if it was used.

Witness excused.

TESTIMONY OF JOHN L. McLEAN.

John L. McLean, sworn as a witness for the defendant, testified as follows on

Direct Examination by Mr. Jones:

My name is John L. McLean. I am president of the [52] Lake Union Dry Dock & Machine Works. I try to visit the plant every morning on my way downtown. I am pretty generally familiar with conditions around the plant at the time the fire occurred. I think Mr. Cutting has covered all the equipment we had there; there were five extinguishers all over the plant. I have considered many times, as an officer of the company, the dangers of fire and have considered what precautions should be taken to guard against danger. I had done so before this fire occurred. We had inspections there at frequent intervals by the City Fire Marshal's office in addition to taking care of the chemicals and inspecting the buildings once a year. Some fire extinguisher company advised us what precautions to take and insurance companies have many times inspected it with reference to fire protection. These inspections

(Testimony of John L. McLean.)

have always generally been with relation to the safety of the plant and boats belonging to other people, et cetera.

Q. You have had considerable experience, besides, where it originated on the boats?

Mr. DeWOLFE: I object to that as immaterial.

The COURT: Sustained.

Mr. JONES: Exception.

The COURT: It is immaterial.

Mr. JONES: I think it is, Your Honor.

The COURT: The objection is sustained.

Mr. JONES: Exception.

We have taken into consideration in affording fire protection the possibility of fire on vessels that were in the plant. After these inspections and recommendations we complied with such things as were recommended by authorities in respect to fire protection to the extent they were practicable and safe. I do not think I can recall any recommendations that we did not comply with. [53]

Cross Examination by Mr. DeWOLFE:

I do not know of my own knowledge whether the fifty-gallon tank was in the shed. I was not there at the time of the fire. I could not answer whether the fifty-gallon chemical tank was locked up that night or not. I saw it outside but do not know whether it was locked up at the time of the fire.

Witness excused.

TESTIMONY OF E. L. SMITH

E. L. Smith, sworn as a witness for the defendant, testified as follows on

Direct Examination by Mr. Jones:

I am Fire Inspector of the Seattle Fire Department and was connected with the Fire Department in December 1931. In response to a call of fire at the Lake Union Dry Dock plant the following engines would be the first to respond: Engine Company #15 at Minor and Virginia; Engine Company #22 at Eleventh North and Howell; Engine Company #25 at Harvard and Union; Truck Company #10 at Harvard and Union. It would take probably about three or four minutes for the first company to respond to an alarm at that location.

Witness excused.

TESTIMONY OF T. W. CLARK

T. W. Clark, sworn as a witness for the defendant, testified as follows on

Direct Examination

I have no connection with the Lake Union Dry Dock and Machine Works at this time. It has been over a [54] year since I worked for them, about eighteen or twenty months. I worked for them probably five or six months after the fire. I had been with them nearly two years at the time. I worked as a machinist part of that time. At the

(Testimony of T. W. Clark.)

time of the fire I was night watchman and as such customarily went around every hour and punched the clocks and then at the end of the next hour I would punch them again and would make the rounds that way. Depending on how fast you are going, it would take you about fifteen minutes to go to the end of the docks and get back. On this particular night I made rounds as usual. The fire occurred a little after five o'clock. That is when I first discovered it. I had been in the boiler room at the usual time previous to the discovery. I was in the dockmaster's office at the time of the fire. It is about one hundred twenty-five feet from the boiler room around at the other end,—about one hundred twenty-five feet from where the fire started. I had been in the dockmaster's office about three quarters of an hour when I learned there was a fire. I made my rounds and punched the clock and then I would stay in the dockmaster's office until I made the next round. I was sitting and reading and Mr. Gallagher said there was a fire in the boiler room. As soon as he came in he went and telephoned and called the fire department. I ran over to the other gate to open it so the fire department could get in. There are two large gates and one small one to the plant. For the location of this fire, the department would use the north gate. It was closed and locked. I have been there before when fire alarms were turned in so know how long it ordinarily takes the fire department to get there. Usually from three to

(Testimony of T. W. Clark.)

five minutes. Ordinari- [55] ly about five minutes. I immediately went over and unlocked the north gate. When I came out of the room I could see the red shine in the boiler room. It was just beginning to break through the roof as near as I could figure. I was in a hurry. I ran out to open the gate and I did not look much at it. I was at the gate just long enough to unlock the gate and open it and come back. I came back and saw they were moving the government boat away from the dock. When I left the gate and came back to the boiler room the fire was breaking through the roof and was spreading over toward the adjoining shed towards the open space. I then rand own an alley way where there was a fire hose, about a two-inch fire house. There was a two-inch connection in the shed; I tried to use that but the flames came out the roof, came up to a ridge like that and the draft carried the flames. It carried the flames along there so I could not use it. I did not get the other hose out of the floating dock. The other men were working at that. When I said they were moving the boat, I did not mean the dinghy,—I meant the large boat. The fire hose that I tried to reach was a canvas hose and it was located half way between the boiler room and the machine shop under the shed. It was under the shed. It was a standard fire hose. I did not use it because it was too hot. The flames were coming through the building there and it drove me out. There was a large chemical apparatus there at the

(Testimony of T. W. Clark.)

time of the fire at the corner of the machine shop about the location marked "Y" on exhibit #3. It was out in the open. I considered the advisability of using this but I figured it was useless at the time, as the fire had gotten such headway. Mr. Gallagher was around there and there was a man living in the house at the south gate. I did not get over to [56] where the Coast Guard vessel was. I saw they were moving that out and the fire department seemed a long while in coming and then I went to telephone again and then I saw they were coming. I could not say how long it was before the fire department got there—probably about five or ten minutes. It was over five minutes I know. I do not know for sure whether the Coast Guard boat had been moved from the dock when the fire department got there. I know when I got back I saw the dock moving out. I mean when I came back from trying to get the hose I saw the floating dock moving out. They were using the rubber hose on the side of the boat when the dock was moving out. There was a slight breeze that was blowing from the north or northeast, if at all, toward the boat.

Cross Examination by Mr. DeWolfe

The wind was blowing from the fire toward the boat. The boat was on the south side of the building. It would take me about fifteen or twenty minutes to make my rounds and the other forty-five minutes would be spent at the dockmaster's office reading or doing anything I wanted to. I

(Testimony of T. W. Clark.)

went on duty at twelve o'clock. Anderson was on the previous shift. If I remember right, there were three clocks to punch. The canvas hose was about fifty feet from where the Guard was moored not quite over on the other side of the machine shop. It was under the lean-to on the shed. It was on a different side of the shed. I did not do anything with the chemical extinguisher that night. It could not have been gotten over for the Coast Guard men to use it. The fire was here (indicating) and there is the machine shop and the fire hose that I spoke about trying [57] to get, I tried to get that but the heat drove me out. It would be impossible to get that chemical cart through there to the fire. The chemical cart was not locked up the night of the fire. The chemical extinguisher was not locked up while I was employed at the Lake Union Dry Docks that I know of. It was locked up sometimes in extremely cold weather. Mr. Gallagher lives in one of the boats on the south side of the plant and is not employed by the Lake Union Dry Dock and Machine Works that I know of and is not nor at the time of the fire was not employed by the Lake Union Dry Dock Company that I know of. The man living at the gate house was likewise not employed. I had not been over to see Mr. Gallagher nor had he come to visit me before the fire. I went into the dockmaster's house about ten or fifteen minutes after four o'clock. I punched the clock at four o'clock and then came back to the boiler room

(Testimony of T. W. Clark.)

to see that everything was all right and left the time clock in the boiler room and from there went to the dockmaster's house. The first time I discovered the fire it was a little after five o'clock. I fixed this by the fact that the time clock was stopped at that time. The time clock said 5:15 o'clock as nearly as I can recollect. It stood at 5:15 when it was found after the fire was out. I saw the fire for the first time after five o'clock and after I had been in the dockmaster's office for forty-five minutes.

Redirect Examination by Mr. Jones:

When I went out and opened the gate and then came back to the fire, it had gained so much headway that I could not have used a fire extinguisher. The fire de- [58] partment had to come in through the gate I opened as the fire plug was over there.

Recross Examination by Mr. DeWolfe:

The Guard could not use the chemical apparatus.

Witness excused.

TESTIMONY OF JAMES LUPTON.

James Lupton, sworn as a witness for the defendant, testified as follows on

Direct Examination by Mr. Jones:

I lived near the plant of the Lake Union Dry Dock & Machine Works at the time of the fire. I live near what they call the south gate. I was not

(Testimony of James Lupton.)

connected in any way with the Lake Union Dry Dock & Machine Works. The first I knew of the fire was when Mr. Gallagher came and knocked at the door and called "fire". It was just getting daylight so it must have been around five o'clock. I got up right away. The fire was going pretty good—coming out of the roof. The fire department had not arrived. It was five or six minutes before the fire department arrived after that. At the time it arrived the fire had progressed pretty good. I think it had gone from the boiler room to the adjoining shop,—I really could not say just where it was. There was a fire extinguisher about every seventy-five feet. I did not see what the Coast Guard men were doing. Mr. Clark, the watchman, was helping me and the fireman. There was only one fireman there before the fire department came. He was waiting. There was nothing one man could do. I do not know just exactly where the fifty [59] gallon extinguisher was at the time but I know there were two of them on the dock out in the open.

Cross Examination by Mr. DeWolfe:

I could not say where the two two-wheeled carts were that night. I surmised they were fire extinguishers. They may have been something else. They may have been gasoline pumps. I got there before five o'clock.

Witness excused.

TESTIMONY OF JOHN GALLAGHER.

John Gallagher, sworn as a witness for the defendant, testified as follows on

Direct Examination by Mr. Jones:

I was at the Lake Union Dry Dock plant the night of the fire. I was on the barge on the south dock. I had no connection with the Dry Dock Company. I will mark with a capital "G" the approximate position of my boat. There were two barges there. I was on the south. I happened to be up and so discovered the fire. Some friends came up to see me. They were going home and I saw the flames shooting out. They had not broken out of the boiler room yet. I ran over to the watchman's office about one hundred fifty or two hundred feet away. Mr. Clark was reading a paper. He had not noticed the fire at that time. I do not think he could see from where he was sitting. I do not think there was any noise to attract his attention. When I came out of the office the fire had broken out. After I had gone to Mr. Clark's office I called the boys on the Coast Guard. I telephoned the central and told her there was a fire. I told her there was a fire on the Lake [60] Union Dry Docks and asked her to sound the alarm. Mr. Clark had everything in readiness for the fire department to come in. I went down to the Coast Guard. I awakened the boys and told them there was a fire. After I called the men on the Guard I passed between the joiner shed and the boiler room. At the time I called out "fire" the fire had not jumped from the boiler room to the joiner

(Testimony of John Gallagher.)

shop. The Coast Guard boys must have gotten up. I did not pay any attention. I went out here (indicating) to get the car parked between the boiler room and the joiner shed out of the way so that the fire department could get at the fire. I do not know how long it took for the fire to jump from the boiler room to the joiner shop. I did not notice what the Coast Guard men were doing during this time. I did not see them take the small boat from the shed and take it down, nor did I notice when they undertook to cast the dry dock off and move it out of the way. There was very little wind. It was blowing toward the Coast Guard. It was blowing from the boiler room toward the Coast Guard. I would say it was about ten or fifteen minutes before the fire department responded. I called them the second time. When they got there the fire was in the joiner shop and burning pretty heavy. I have seen the big fire extinguisher at the plant close by the machine shed. I could not say whether it was there at the time of the fire.

Cross Examination by Mr. DeWolfe:

I called Mr. Clark about 4:15 or 4:30 o'clock. I did not look at my watch. We were having a party with a little moonshine liquor,—one woman and three men. We had a pint for all of us for the whole evening. I had gotten there about two o'clock and had had nothing to drink before [61] I arrived there. I had three or four drinks but not enough to make me intoxicated. The drinks were not very big. It was 4:15 or 4:30 o'clock when I called Mr.

(Testimony of John Gallagher.)

Clark. The fire department came about fifteen minutes after I called them the first time. Neither myself, Mr. Clark, Mr. Lupton or any of us besides the Coast Guard worked any of the fire equipment.

Redirect Examination by Mr. Jones:

I was not drunk at any time during the evening of the fire and Mr. Clark was not with me that evening.

Witness excused.

TESTIMONY OF J. A. BALE.

J. A. Bale, sworn as a witness for the defendant, testified as follows on

Direct Examination by Mr. Jones:

I am dockmaster for the Lake Union Dry Dock and Machine Works and have been with them since 1925 and was working in that capacity in December 1931 when the fire occurred. I am familiar with the fire equipment around the plant. We have two large chemical wagons, that is, one about 30 and one 40, or else one 40 and one 50, with two wheels and several small ones. One is kept by the machine shop and one by the sales office. Capital "Y" on exhibit #3 indicates the one located by the machine shop. The location of the other is indicated by a capital "Z" and then we have small extinguishers. I have had experience with fires. We have not had many. We have had gasoline fires and the extinguishers are effective to extinguish fires even of considerable size.

(Testimony of J. A. Bale.)

I am familiar with other smaller [62] plants in the city as to fire protection. Our extinguishers are of similar size as those in other plants. There was one hose lying abreast of the Guard or pretty close to amidships of the Guard,—a one-inch hose and we had one hydrant on the opposite side of the building from the dock approximately one hundred feet across, and not over one hundred or one hundred twenty-five feet the shortest way around. We had a fire hose there fifty feet long. This hose itself would not reach the Coast Guard boat. The water would reach the boat. It was a five-eighths nozzle at the end and a two-inch hose. I would say that the one-inch hose would throw a stream of water one hundred or one hundred fifty feet. The fire hose would throw a stream about one hundred or one hundred twenty-five feet. I remember the way the Coast Guard boat was docked at that time. I got to the fire about 5:30 or 5:35 A. M. The fire was pretty well along. It was nearly out with the exception of near the boiler room. The flame was nearly all destroyed. There was very little wind. I did not even notice there was any wind. It would influence the fire very little. There was nothing about conditions with respect to the way it had burned and what had burned that would give any indication as to the way the wind was blowing. The Coast Guard boat was right alongside the slip across the piling. When there is no wind it is very easy to move the dry dock. One man can move it. It is much better for two. Of course, when it is windy it is harder to

(Testimony of J. A. Bale.)

move, even with an adverse wind. I have never had over two men to move the floating dock. It would take about five or six minutes to shove the dock across the water. There is only one line on each end and all we have to do is to let it go and shove. There were pike poles at the head of the dry dock about [63] one hundred twenty-five or one hundred thirty feet away from where the boat was. There was not much lumber in the joiner shed. There are always some pieces that could be used for poles in the joiner shed. I did not talk with any of the Coast Guard men. The large fire extinguisher was not locked up. We had to clean the cinders out of the box where the hose is on the large fire extinguisher and from that I know that it was not locked up. I saw it next morning a short time after we started to clean up. Defendant's exhibit A-1 was taken straight across from the gas station looking toward where the boiler room was; this was taken of course, after the fire had occurred. The Coast Guard rested at that time about ten feet forward of where the dry dock lays in the picture.

(Defendant's exhibit A-1 admitted in evidence.)

Defendant's exhibits A-2 and A-3 represent dry dock number two, the dry dock the Coast Guard boat was on, taken after the fire, showing the character of the burn. Defendant's exhibits A-4 and A-5 are a picture of the Coast Guard boat.

(Defendant's exhibits A-2, A-3, A-4 and A-5 were admitted in evidence.)

(Testimony of J. A. Bale.)

Cross Examination by Mr. DeWolfe:

From the evidence I saw of it, it was a pretty good fire. We never had a fire like that before and never had opportunity to test our particular fire equipment out before.

Witness excused. [64]

Thereupon both sides rested and defendant presented to the Court and filed a written motion for judgment in its favor, a copy of said motion being hereto attached, marked Exhibit "A" and by this reference made a part hereof as though fully set forth herein. The Court requested that the testimony of the witnesses be transcribed and submitted, together with findings to be proposed by respective parties and memoranda of points and authorities. Such proposed findings and memoranda were submitted by each party and thereafter, at the request of the Court, the matter was called up for oral argument, following which the Court rendered a written decision making special findings and directing judgment in favor of the plaintiff, which was filed on December 26, 1933.

A copy of defendant's proposed findings of fact, the original of which was filed with said Court on the 26th day of December, 1933, is attached hereto, marked Exhibit "B" and by this reference made a part hereof as though fully set forth herein.

Subsequent to the filing of the special findings of the Court, and on the 30th day of December, 1933, defendant made and filed exceptions to the said findings of the Court, and made a request for additional findings. On the 12th day of June, 1934, defendant's exceptions to the Court's findings were noted and allowed. On the same date, the Court having declined to make additional findings as requested by defendant, the defendant in open court duly excepted thereto, which exceptions were noted and allowed.

A copy of defendant's exceptions to findings and request for additional findings, the original of which was filed with said Court on the 30th day of December, 1933, is hereto attached, marked Exhibit "C" and by this reference made a part hereof as though fully set forth herein. [65]

CERTIFICATE OF COURT TO BILL OF EXCEPTIONS.

Thereafter, on the 12th day of July, 1934, and within the time allowed by the United States District Court, the defendant duly tendered this, its bill of exceptions herein, which having been seen and examined by the Court, and counsel, is by the Court allowed and approved, and said Bill of Exceptions is signed and sealed by the Honorable Jeremiah Neterer, judge of the said Court, before whom said proceedings were had, and the same is ordered by said Court to be filed and made a part

of the record herein, which is now accordingly done, and it is ordered that said bill be filed, and filing shown of record as of this 12th day of July, 1934.

I, Jeremiah Neterer, judge of the United States District Court of the Western District of Washington, Northern Division, and the judge before whom the above entitled cause was tried, do hereby certify:

That the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause.

I do further certify that the foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part of the record herein.

I do further certify that the foregoing statement of facts contains all of the evidence and testimony introduced upon the trial of said cause, together with all objections and exceptions made and taken to the admission or exclusion of testimony, and all motions, offers to prove and admissions and rulings thereon not already a part of the record herein.

I do further certify that Exhibits Nos. 1 to 8 inclusive, and Nos. A-1 to A-5 inclusive, are all of the exhibits admitted upon [66] the trial of said cause, with the exception of certain Coast Guard regulations admitted and considered pursuant to stipulation.

GIVEN UNDER MY HAND AND SEAL this 12th day of July, 1934.

JEREMIAH NETERER,

Judge.

Approved as to form and substance and notice of presentation waived:

DATED this 12th day of July, 1934.

J. CHARLES DENNIS,
U. S. Atty.
JOHN AMBLER,
Asst. U. S. Atty.
Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 12, 1934. [67]

EXHIBIT "A."

[Title of Court and Cause.]

MOTION FOR JUDGMENT.

Comes now the defendant at the conclusion of the submission of evidence upon the trial of the above entitled action, both parties having rested, and moves the court for judgment in its favor and for a dismissal of plaintiff's action, upon the ground and for the reason that under the evidence herein, and the law applicable thereto, the defendant is not liable to the plaintiff for the damage sustained in the transaction involved in this proceeding.

WRIGHT, JONES & BRONSON,
Attorneys for Defendant.

Service of the foregoing motion hereby admitted, and it is hereby stipulated and agreed that the same may be considered as made and filed in open court at the conclusion of the testimony in the case and upon submission for decision.

TOM DeWOLFE,
As't U. S. Atty.

EXHIBIT "B"

[Title of Court and Cause.]

DEFENDANT'S PROPOSED FINDINGS OF FACT.

Comes now the defendant, and pursuant to the order and direction of the Court, submits herewith its proposed findings of fact, which it maintains are established by the evidence herein, and requests the Court to find such facts, or the substance thereof, as herewith proposed:

I.

That during all of the time hereinafter mentioned, the defendant herein was, and is now, a corporation sovereign.

II.

That the defendant is, and at all times hereinafter mentioned was, a corporation existing under the laws of the State of Washington, with its principal place of business in the city of Seattle, State of Washington, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court; that the said defendant was at the times hereinafter mentioned, engaged in conducting a ship-repair business at its plant located in the city of Seattle, for the repair and rebuilding of vessels, including the dry-docking thereof.

III.

That on or about the 18th day of November, 1931, the defendant entered into a contract with the plain-

tiff for the making of certain repairs on the United States Coast Guard vessel "Guard," which contract is in evidence herein, as plain- [69] tiff's exhibit No. 1.

IV.

That on December 30, 1931, such contract was in course of performance by the defendant, and the said vessel, at the time of occurrence of the fire hereafter referred to, was resting upon a floating drydock, 32 feet wide, and 70 feet long, moored upon the southerly side of a wharf, the face of which extended generally in an east and west direction, in the position marked "A" upon the map of defendant's premises, introduced in evidence as plaintiff's Exhibit 3; that to the south of said vessel was an open waterway, bounded upon the southerly side by a row of piles extending in an east and west direction, parallel to the wharf against which said dry dock lay, and about 100 feet south thereof; that to the north of said dry dock, and located upon the wharf against which the dry dock lay, and extending in an easterly and westerly direction, at a distance of about thirty feet from the southerly side of said wharf, was an open woodworking shed designated as a joiner shop, extending parallel to said dry dock to a distance approximately twenty feet beyond the easterly end thereof; that located about twelve to fifteen feet east of the easetrly end of said joiner shop was a boiler room about twelve by sixteen feet in dimensions, which boiler room was in a north-easterly direction from said floating dock, and distant about fifty feet therefrom.

V.

That said vessel was required to carry, and did carry, pursuant to Coast Guard regulations in evidence herein as defendant's Exhibit A6, fire equipment for her own protection, consisting of extinguishers, sand in boxes, water in buckets, and fire hose connected with her own pumping equipment, but that by reason of being out of the water, and her own engines being dismantled, said vessel, at the time of the fire hereinafter referred to, was unable to use her own equipment for pumping [70] water; that the plant of the defendant was equipped with modern and sufficient fire-fighting equipment for its own protection, consisting primarily of approved chemical extinguishers located at various positions throughout the plant; that three 2½-gallon chemical extinguishers, separated by twenty-foot intervals, were hung upon the southerly side of the posts supporting the south side of the joiner shop, and directly opposite the said dry dock, and approximately thirty feet therefrom, and a fifty-gallon chemical cart extinguisher was located upon the northerly side of said joiner shop at the point marked "Y" on plaintiff's Exhibit 3B; that said extinguishers just referred to were accessible and available for use, but that defendant had not advised the crew of said vessel of their location or instructed them in the use of such extinguishers; that a convas-covered fire hose and connection was located upon the northerly side of the joiner shop at the point marked "O" upon plaintiff's Exhibit 3B; that in

addition there was a city watermain connection upon the dock, immediately adjoining said dry dock, in which there was a pressure of 125 pounds; that connected thereto was a strong rubber hose, capable of withstanding such pressure, of one inch inside diameter, and approximately 150 feet in length, and capable of throwing a stream of water at least sixty to seventy feet.

VI.

That defendant's workmen were engaged in working upon said vessel under said contract on December 30, 1931, *upon* until about 4:30 o'clock P. M., at which time they left said vessel. That on said day the regular crew of said vessel consisted of its commanding officer and seven men; that the commanding officer left said vessel about 5:00 P. M. on December 30th, and that all of said crew except two men were permitted to leave, and did leave said vessel, at or about the same time; that the crew of two men left on board were considered by the plaintiff and its commanding [71] officer to be adequate and sufficient to care for the safety of said vessel in any emergency that might ordinarily arise, and also were considered sufficient to move the dry dock if necessary, and to extinguish any fire, or take care of anything out of the ordinary which would occur on board of said vessel. That it was the practice of the crew of said vessel to take the hose connected with the main adjoining said dry dock on board the said vessel at night for its protection against fire,

and that on the evening of December 30, 1931, said hose was properly connected up to said main, and was tested by the commanding officer of said vessel, and the nozzle-end thereof taken on board of said vessel so as to be available in the event of fire, and that the commanding officer of said vessel considered that it was sufficient to take care of a fire on board said vessel.

VII.

That early in the morning of December 31, 1931, about the hour of 4:30 or 5:00 A. M., a fire originated at defendant's plant in the boiler room; that said fire was discovered by a care-taker living upon a barge moored at defendant's plant, but who was not employed by defendant; that such person immediately notified defendant's watchman, who was then in the dock-master's office, from which point the fire was not visible; that such person immediately telephoned in an alarm for the fire department, and then went to a point on the wharf adjoining said vessel and called the members of the crew, and as soon as possible after being called, the members of the crew responded, and went from their vessel to the wharf; that at that time the fire was confined to the inside of the boiler room, and flames were just beginning to break through the roof; that the members of the crew took the hose from on board the "Guard" on to the wharf, and turned on the water pressure, and endeavored for a period of five to seven minutes to put out the fire in the boiler room, but were unable to do so. [72] That

the fire made headway, and spread to the joiner shop on the west; that stored in said joiner shop, at a point forty to fifty feet from the easterly end thereof, was a dinghy belonging to the plaintiff's vessel; that after abandoning efforts to put out the fire, the crew dropped the hose on the wharf and went into the shed and carried out the dinghy, and took it to a point approximately 125 feet distant, and then returned; that the heat and sparks from the fire had by this time ignited the canvas hatch covering on said vessel; that the crew thereupon cut or cast off the lines going from the dry dock to the wharf, and with the assistance of the wind, the dock was pushed and drifted out in a south-westerly direction into the open channel out of range of the fire, and the crew thereupon extinguished any flames remaining by the use of buckets and water dipped from alongside the dock; that at no time did the crew use said hose above referred to upon said vessel; that had said hose been kept on board said vessel, and used for the protection of said vessel, it could have prevented, or substantially lessened, the damage that said vessel suffered from the fire; that the vessel was scorched and charred by the heat, necessitating repairs as set forth in plaintiff's Exhibits 2 and 5, for the making of which plaintiff paid the sum of $3,362.00.

VIII.

That immediately upon being notified of the fire, defendant's watchman went to unlock the gate at

the northerly edge of defendant's plant, in order to permit the fire department to enter; that ordinarily the first equipment of the fire department of the city of Seattle would respond to a call from such location in from three to five minutes, but that upon this occasion such equipment did not arrive for a period of from fifteen to twenty minutes; that when the watchman unlocked the gate he returned to the scene of the fire, which had then spread to the joiner shop; [73] that he endeavored to reach the fire hose upon the northerly side thereof, but that by reason of the draught and the heat carried under the roof he was unable to do so, and was likewise unable to make use of the chemical cart above referred to.

IX.

That the dry dock upon which said vessel rested was moored to the wharf by lines fastened to cleats in the usual manner; and such dry dock was capable of being readily moved by two men, particularly in the case of an assisting breeze; that at the time of such fire there was a light breeze from the north or northeast, blowing from the fire towards the dry dock; that the crew of said vessel did not undertake to move said dock for at least fifteen minutes after they were awakened, and went on board the wharf and began fighting the fire; that had they undertaken to move it at once, or even at the time they ceased using the hose and went to carry out the dinghy, they could have moved it out of reach of the fire in time to have prevented the damage

that occurred to the boat, or a very substantial part thereof; that there was nothing to prevent the crew from moving said vessel immediately they were awakened, and went on deck.

DONE IN OPEN COURT this.....day of November, 1933.

.....

Judge. [74]

EXHIBIT "C"

[Title of Court and Cause.]

DEFENDANTS EXCEPTIONS TO FINDINGS, AND REQUEST FOR ADDITIONAL FINDINGS.

Comes now the defendant, and excepts to the findings of the Court filed herein upon the 26th day of December, 1933, and to the Court's refusal to make findings as proposed in defendant's proposed findings of fact filed herein pursuant to order and direction of the Court upon the 26th day of December, 1933, and requests the Court to make additional findings herein as follows:

I.

The defendant excepts to the following findings as made by the Court, and to each of them, upon the ground that such findings are unsupported by and contrary to the evidence in the case:

(a) To that portion of finding number 3, reciting that the crew of the plaintiff had not, by the defendant, nor by any other person, been advised

or instructed in the use of such fire extinguishers, or given authority or permission to use the same.

(b) To that portion of finding number 3, reciting:

> "That there was no fire hydrant or water-main for fire protection on the wharf adjacent to the dry dock or the Guard, or between said vessel and the joiner shop;"

(c) To that portion of finding number 3, reciting that the fire equipment carried by the Guard for its own protection was [75] rendered useless during the time it was in dry dock, except as to the water pumps.

(d) To that portion of finding number 3, reciting that: "The seamen acted with all diligence and as reasonably prudent persons would under the circumstances."

(e) To that portion of finding number 3, reciting that: "There was no fire protection afforded for the protection of the vessel on the dry dock, either by water supply or chemical apparatus."

(f) To that portion of finding number 3, reciting that: "The court finds that the relation between the plaintiff and the defendant was that the bailor and bailee, under bailment to the mutual benefit of both parties, in which the bailee agreed to furnish the vessel ample fire protection during the time in dry dock or on the marine way, and said bailee failed to exer-

cise, under the circumstances, ordinary care required under the law and the said contract."

II.

The defendant excepts to the finding or conclusion of law "that plaintiff is entitled to recover judgment against the defendant in the sum of $3,362.00, together with the interest thereon from the date of demand, and the costs and disbursements to be taxed herein," upon the ground that such finding is not supported by, but is contrary to the evidence and the findings of the Court herein.

III.

The defendant excepts to the failure and refusal of the Court to make and enter such portions of defendants proposed findings of fact filed herein upon the 26th day of December, 1933, as are hereinafter set forth, or the substance thereof, and moves for additional findings in such respects as hereinafter set forth, upon the ground that such findings and the propositions covered thereby, as hereinafter set forth, were and are established by the positive, undisputed evidence in this case, and reasonable and necessary inferences therefrom: [76]

(a) To the failure and refusal of the Court to find as set forth in paragraph V of defendant's proposed findings:

"That said vessel was required to carry, and did carry, pursuant to Coast Guard regulations in evidence herein as defendant's Exhibit A6,

fire equipment for her own protection, consisting of extinguishers, sand in boxes, water in buckets. * * *"

(b) To the failure and refusal of the Court to find as set forth in paragraph VI of defendant's proposed findings, reciting:

"That the crew of two men left on board were considered by the plaintiff and its commanding officer to be adequate and sufficient to care for the safety of said vessel in any emergency that might ordinarily arise, and also were considered sufficient to move the dry dock, if necessary, and to extinguish any fire, or take care of anything out of the ordinary which would occur on board said vessel."

(c) Defendant also requests the Court to make a finding upon the proposition that the purpose of the fire protection clause in the contract was to furnish to the vessel similar fire protection to that provided by her own equipment when not out of commission, and that such protection was furnished by the hose and water supply provided for said vessel.

(d) To the failure and refusal of the Court to find as set forth in paragraph VI of defendant's proposed findings, reciting:

"That the commanding officer of said vessel considered that it was sufficient to take care of a fire on board said vessel."

and in connection therewith defendant requests the court to make and enter its finding upon the propo-

sition of whether or not the commanding officer of the Guard considered and accepted the hose furnished to the vessel as being adequate and sufficient for its protection.

(e) To the failure and refusal of the Court to find as set forth in paragraph VII of defendant's proposed findings, [77] reciting that at the time the members of the crew went from the vessel to the wharf,

> "the fire was confined to the inside of the boiler room, and the flames were just beginning to break through the roof,"

and that the members of the crew endeavored for a period of five to seven minutes to put out the fire in the boiler room.

(f) To the failure and refusal of the Court to find as set forth in paragraph VII of defendant's proposed findings, reciting that:

> "The dock was pushed and drifted out in a south-westerly direction into the open channel out of range of the fire, and the crew thereupon extinguished any flames remaining by the use of buckets and water dipped from alongside the dock."

(g) To the failure and refusal of the Court to find as set forth in paragraph VII of defendant's proposed findings, reciting:

> "That at no time did the crew use said hose above referred to upon said vessel; that had said hose been kept on board said vessel, and

used for the protection of said vessel, it could have prevented, or substantially lessened, the damage that said vessel suffered from the fire;"

and in this connection the defendant requests the Court to make a finding upon the proposition as to whether or not, if the hose kept on board the vessel had been used upon the vessel, it would have prevented or substantially lessened the damage which occurred.

(h) To the failure and refusal of the Court to find as set forth in paragraph VIII of defendant's proposed findings, reciting that the watchman

"endeavored to reach the fire hose upon the northerly side thereof, but that by reason of the draught and the heat carried under the roof, he was unable to do so, and was likewise unable to make use of the chemical cart above referred to."

(i) To the failure and refusal of the Court to find as set forth in paragraph IX of defendant's proposed findings, [78] reciting that:

"Such dry dock was capable of being readily moved by two men, particularly in the case of an assisting breeze; that at the time of such fire there was a light breeze from the north or northeast, blowing from the fire towards the dry dock; that the crew of said vessel did not undertake to move said dock for at least fifteen minutes after they were awakened, and went on board the wharf and began fighting the fire; that

had they undertaken to move it at once, or even at the time they ceased using the hose and went to carry out the dinghy, they could have moved it out of reach of the fire in time to have prevented the damage that occurred to the boat, or a very substantial part thereof; that there was nothing to prevent the crew from moving said vessel immediately they were awakened, and went on deck;"

and in connection with the foregoing, the defendant requests the Court to make and enter its finding upon the following propositions:

1. What period of time elapsed from the time that the crew of the Guard was awakened and available for duty, to the time that they commenced moving the dry dock upon which the Guard rested away from the wharf?

2. Could the damage to the Guard have been prevented, had the crew of the Guard cut it loose and pushed it away from the dock.

(a) Immediately upon responding to the alarm and before endeavoring to put out the fire:

(b) At the time of ceasing efforts to put out the fire and before moving their dinghy?

3. Defendant also requests the Court to make a finding upon the proposition that at the time of the occurrence of said fire, the vessel was in the possession and under the control of the plaintiff, and

not in the exclusive possession and [79] control of the defendant.

WRIGHT, JONES & BRONSON,
Attorneys for Defendant.

The foregoing exceptions are hereby noted and allowed this 12th day of June, 1934.

JEREMIAH NETERER,
Judge.

The Court, having declined to make additional findings as requested by the defendant in paragraph III above, the defendants thereupon, in open Court, duly excepted thereto, which exception is hereby noted and allowed.

DATED this 12th day of June, 1934.

JEREMIAH NETERER,
Judge. [80]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the above entitled Court:

Please prepare a transcript of record herein to include the following:

1. Plaintiff's complaint.
2. Defendant's answer.
3. Plaintiff's reply.
4. Stipulation waiving jury.
5. Bill of Exceptions.
6. Stipulation and Coast Guard Regulations.

7. Defendant's motion for judgment (by reference to Exhibit "A" of bill of exceptions).
8. Defendant's proposed findings of fact (by reference to Exhibit "B" of bill of exceptions).
9. Court's written findings of fact and conclusions of law filed December 26, 1933.
10. Defendant's exceptions to findings, and request for additional findings (by reference to Exhibit "C" of bill of exceptions.
11. Judgment.
12. Defendant's exceptions to judgment.
13. Assignment of errors.
14. Petition for appeal.
15. Order allowing appeal and fixing bond.
16. Order respecting transmission of exhibits.
17. Citation on appeal (original). [81]
18. Clerk's certificate.
19. Cost and supersedeas bond on appeal.
20. This praecipe.

WRIGHT, JONES & BRONSON
Attorneys for Defendant.

Received a copy of the within praecipe this 16th day of July, 1934.

J. CHARLES DENNIS
Attorney for Pltf.

[Endorsed]: Filed Jul. 16, 1934. [82]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington.—ss.

I, Edgar M. Lakin, Clerk of the above entitled Court do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 82, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the Judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit: [83]

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 219 folios at 15¢	$32.85
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to original exhibits	.50

I hereby certify that the above cost for preparing and certifying record, amounting to $38.85 has been paid to me by the attorneys for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this.....day of August, 1934.

[Seal] ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington,
By TRUMAN EGGER
Deputy. [84]

[Title of Court and Cause.]

CITATION ON APPEAL.

THE PRESIDENT OF THE UNITED STATES,
To: THE ABOVE ENTITLED PLAINTIFF, and
To: J. CHARLES DENNIS, United States District Attorney, and
To: JOHN AMBLER, Assistant United States District Attorney, its Attorneys,
GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, in the State of California, within thirty (30) days from the date

of this writ, pursuant to an appeal filed in the office of the clerk of the District Court of the United States for the Western District of Washington, Northern Division, wherein The United States of America, a corporation sovereign, is plaintiff, and Lake Union Dry Dock & Machine Works, a corporation, is defendant, to show cause, if any there be, why the judgment in such appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

WITNESS the Honorable Jeremiah Neterer, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 16 day of July, 1934.

JEREMIAH NETERER
Judge.

Copy of the above citation received and due service of the same is hereby acknowledged this 16th day of July, 1934.

J. CHARLES DENNIS,
U. S. Atty.,
Attorney for Plaintiff.

[Endorsed]: Filed Jul. 16, 1934. [85]

[Endorsed]: No. 7569. United States Circuit Court of Appeals for the Ninth Circuit. Lake Union Dry Dock & Machine Works, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed August 8, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7569

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

LAKE UNION DRY DOCK & MACHINE WORKS,
a corporation, *Appellant,*

—VS.—

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM A JUDGMENT
OF THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

RAYMOND G. WRIGHT,
H. B. JONES,
ROBERT E. BRONSON,
STORY BIRDSEYE,
Attorneys for Appellant.

Office and Post Office Address:
610-619 Colman Building,
Seattle, Washington.

FRAYN PRINTING COMPANY

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ON APPEAL FROM A JUDGMENT
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HON. JEREMIAH NETERER, *Judge.*

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Western District of Washington, Northern Division, entered upon the 12th day of June, 1934, by the Honorable Jeremiah Neterer, Judge.

The suit was brought by appellee as an action at law to recover for damages sustained by the United States Coast Guard Cutter "Guard", as the result of a fire at Appellant's plant on December 30, 1931. The parties, by stipulation, waived a trial by jury (Tr. p. 10) and the cause was submitted to the Court for determination. At the conclusion of the hearing, appellant served and filed a written motion for a judgment of dismissal. (Tr. p. 75) On this being denied, appellant proposed findings of fact and conclusions of law (Tr. p. 76-83) as did appellee.

Subsequently the Court made and entered findings of fact and conclusions of law in the cause. (Tr. p. 13-18) Appellant immediately excepted to a number of these findings and conclusions, as well as to the failure of the Court to make and enter several of the findings of fact which it had proposed. (Tr. p. 83-90) Appellant further requested additional findings on propositions of law and fact, (Tr. p. 83-90) which findings the Court declined to make, (Tr. p. 90) and to this action appellant likewise excepted. (Tr. p. 90) All of these exceptions were allowed by the Court. (Tr. p. 90)

Judgment was thereupon entered in favor of the appellee and against the appellant in the sum of $3362.00, together with interest thereon at the legal rate from March 12, 1932, plus costs. (Tr. p. 19 and 20) Appellant immediately excepted to the judgment, which exception was noted and allowed. (Tr. p. 20) It is from that judgment that this appeal is prosecuted.

Appellant operates a dry dock and repair yard in Seattle, the plant being located on the south end of Lake Union. Shortly prior to the time of the fire, appellant entered into a written contract (Plaintiff's Exhibit 1) with appellee, to make certain repairs to the United States Coast Guard Cutter "Guard", for an agreed price of $650.00. This instrument contained the following provision in reference to fire protection:

> "General Conditions — Fire Protection. It is clearly understood that the contractor agrees to furnish the vessel with ample fire protection during the time in dry dock or on the marine way."

As a portion of the work to be done required that the boat be taken out of the water, the vessel was drawn up on a barge, or, as it was called by the witnesses, a floating dry dock, thirty-two feet wide by seventy feet long. This floating dock was moored in an open waterway on the south side of a wharf which ran in a westerly direction out into the lake. This wharf formed the north side of the waterway referred to, which waterway was approximately one hundred feet wide, being bounded on the south by a row of piling running parallel to the wharf.

A large building with open sides, known as a joiner shop, had been erected on the wharf in such a position as to be parallel with the latter. The south side of this building was in about thirty feet from the south edge of the wharf and its east end extended approximately thirty feet beyond the east end of the floating dry dock. Fifteen feet east of this joiner shop, and on the same

wharf, was a boiler room twelve feet by sixteen feet in size. This latter building was in a northeasterly direction from the floating dock and was approximately fifty feet distant therefrom. Appellant's entire plant was adequately equipped with fire fighting devices.

On the morning of December 30, 1931, at about the hour of five o'clock, a fire was discovered in the boiler room. The fire department was immediately called, but, for some reason, it did not respond promptly. The wind, at the time, was from the northeast, blowing toward the "Guard," and the fire was communicated to the joiner shop, with the result that most of this building and the boiler room were entirely destroyed.

Prior to the fire, and for the purpose of furnishing protection to the vessel against fire, a one hundred and fifty foot length of hose, with an inside diameter of one inch, had been connected to a main on the wharf opposite the floating dock and the nozzle end had been taken on board the vessel. At the time of the fire, a crew of two was stationed on the "Guard", and these men were called immediately after the fire was discovered, at which time it was just beginning to break out of the boiler room. They immediately took the hose from their own vessel and turned the water on the burning building. After several minutes they realized that they could not extinguish the blaze, whereupon they went to the joiner shop to get a dinghy belonging to their boat. This they carried to a place of safety. On returning to the "Guard", some fifteen or twenty minutes after they had left the boat, they discovered that the

floating dock was beginning to take fire, whereupon they cut it loose from the wharf and, with the aid of the wind, moved it to the south across the waterway, where they extinguished the blaze. In the interim, the vessel had become badly scorched and it was subsequently necessary to repair her, the expense of which amounted to $3362.00.

Suit was thereafter brought by appellee aaginst appellant to recover this sum, it being charged that the latter company was a bailee of the vessel for hire and that after the fire had been discovered, it had negligently permitted the blaze to spread to the boat. No negligence was alleged in connection with the origin of the fire. Appellee further charged that appellant had violated its contract in that it had failed to furnish protection against fire as called for by that agreement.

These allegations were denied by the appellant and the latter further pleaded, as an affirmative defense, that the crew of the vessel had ample opportunity to remove the "Guard" to a position of safety and that they were guilty of a breach of a legal duty in failing to do so.

ASSIGNMENTS OF ERROR

Appellant's assignments of error (Tr. p. 22-28) can be classified into four general categories, and for the sake of convenience they will be thus considered in this brief. We contend that the Court erred:

I. IN HOLDING THAT THE RELATIONSHIP EXISTING BETWEEN APPELLEE AND APPELLANT AT THE TIME OF THE FIRE WAS THAT OF BAILOR AND BAILEE.

(a) In making and entering that portion of Finding of Fact No. 3 reciting:

"The Court finds that the relation between the plaintiff and the defendant was that of bailor and bailee, under bailment to the mutual benefit of both parties." (Assignment of Error VI; Tr. p. 24).

(b) In failing and refusing to make findings upon the following propositions as requested by appellant:

"That at the time of the occurrence of the fire, the vessel was in the possession and under the control of the plaintiff, and not in the exclusive possession and control of the defendant." (Assignment of Error VIII (f); Tr. p. 28).

II. IN HOLDING THAT THE APPELLANT DID NOT EXERCISE ORDINARY CARE IN PROTECTING THE "GUARD" AFTER THE FIRE WAS DISCOVERED.

(a) In making and entering that portion of Finding of Fact No. 3 reciting that:

"said bailee failed to exercise, under the circumstances, ordinary care required under the law and the said contract." (Assignment of Error VI; Tr. p. 24).

(b) In failing and refusing to make findings upon the following proposition as proposed and requested by appellant.

"That defendant's watchman endeavored to reach the fire hose upon the northerly side of the shed upon the wharf adjoining the vessel, but that by reason of the draft and the heat carried under the roof, he was unable to do so, and was likewise unable to make use of the chemical cart above re-

ferred to." (Assignment of Error VII (g); Tr. p. 26).

III. IN HOLDING THAT APPELLANT DID NOT FURNISH THE "GUARD" WITH THE FIRE PROTECTION CALLED FOR BY THE CONTRACT.

(a) In making and entering the portions of Finding of Fact No. 3 reciting:

(1) "That there was no fire hydrant or water main for fire protection on the wharf adjacent to the dry dock, or the 'Guard', or between said vessel and the joiner shop." (Assignment of Error II; Tr. p. 22, 23).

(2) "That the fire equipment carried by the 'Guard' for its own protection was rendered useless during the time it was in dry dock." (Assignment of Error III; Tr. p. 23).

(3) "That there was no fire protection afforded for the protection of the vessel on the dry dock, either by water supply or chemical apparatus." (Assignment of Error V; Tr. p. 23).

(b) In failing and refusing to make and enter the following portions of appellant's proposed findings:

(1) "That said vessel was required to carry, and did carry, pursuant to Coast Guard Regulations in evidence herein as defendant's Exhibit A-6, fire equipment for her own protection, consisting of extinguishers, sand in boxes, water in buckets * * *". (Assignment of Error VII (a); Tr. p. 24).

(2) "That the commanding officer of said vessel considered that the hose furnished by the defend-

ant, and the water supply, to be made available, was sufficient to take care of a fire on board said vessel." (Assignment of Error VII (c); Tr. p. 25).

(c) In failing and refusing to make a finding on the following proposition as requested by appellant:

(1) "That the purpose of the fire protection clause in the contract between the plaintiff and defendant, was to furnish to the vessel similar fire protection to that provided by her own equipment when not out of commission, and that such protection was furnished by the hose and water supply provided for said vessel." (Assignment of Error VIII (a); Tr. p. 27).

(2) "As to whether or not the commanding officer of the 'Guard' considered and accepted the hose furnished to the vessel as being adequate and sufficient for its protection." (Assignment of Error VIII(b); Tr. p. 27).

IV. IN FAILING TO HOLD THAT THE CREW OF THE "GUARD" BREACHED THEIR DUTY TO PROTECT THEIR VESSEL.

(a) In making and entering the portion of Finding of Fact No. 3 reciting:

"The seamen acted with all diligence, and as reasonably prudent persons would under the circumstances." (Assignment of Error IV; Tr. p. 23).

(b) In failing and refusing to make and enter

the following portions of appellant's proposed findings:

(1) "That the crew of two men left on board were considered by the plaintiff and its commanding officer to be adequate and sufficient to care for the safety of said vessel in any emergency that might ordinarily arise, and also were considered sufficient to move the dry dock, if necessary, and to extinguish any fire, or take care of anything out of the ordinary which would occur on board said vessel." (Assignment of Error VII (b); Tr. p. 25).

(2) "That at the time the members of the crew went from the vessel to the wharf, the fire was confined to the inside of the boiler room, and the flames were just beginning to break through the roof, and that the members of the crew endeavored for a period of five to seven minutes to put out the fire in the boiler room." (Assignment of Error VII (d); Tr. p. 25).

(3) "That the dock was pushed and drifted out in a southwesterly direction into the open channel, out of range of the fire, and the crew thereupon extinguished any flames remaining by the use of buckets and water dipped from alongside the dock." (Assignment of Error VII (e); Tr. p. 25).

(4) "That at no time did the crew use the hose furnished by the defendant upon said vessel; that had said hose been kept on board said vessel, and used for the protection of said vessel, it would have

prevented or substantially lessened the damage that said vessel suffered from the fire." (Assignment of Error VII (f); Tr. p. 25).

(5) "That the dry dock on which the vessel rested, was capable of being readily moved by two men, particularly in the case of an assisting breeze; that at the time of such fire there was a light breeze from the north or northeast, blowing from the fire towards the dry dock; that the crew of said vessel did not undertake to move said dock for at least fifteen minutes after they were awakened, and went on board the wharf and began fighting the fire; that had they undertaken to move it at once, or even at the time they ceased using the hose and went to carry out the dinghy, they could have moved it out of reach of the fire in time to have prevented the damage that occurred to the boat, or a very substantial part thereof; that there was nothing to prevent the crew from moving said vessel immediately they were awakened, and went on deck." (Assignment of Error VII (h); Tr. p. 26).

(c) In failing and refusing to make findings on the following propositions as requested by appellant:

(1) Whether or not, if the hose kept on board the vessel had been used on the vessel, it would have prevented or substantially lessened the damage which occurred. (Assignment of Error VIII (c); Tr. p. 27).

(2) What period of time elapsed from the time

that the crew of the "Guard" was awakened, and available for duty, to the time that they commenced moving the dry dock upon which the "Guard" rested away from the dock. (Assignment of Error VIII (d); Tr. p. 27).

(3) Whether or not the damage to the "Guard" could have been prevented, had the crew of the "Guard" cut it loose and pushed it away from the dock:

1. Immediately upon responding to the alarm and endeavoring to put out the fire;

2. At the time of ceasing efforts to put out the fire and before moving the dinghy.

(Assignment of Error VIII (e); Tr. p. 27, 28).

Appellant also, of course, assigns error in the making and entry by the Court of the conclusion of law to the effect that the appelee is entitled to recover judgment against the appellant in the sum of $3362.00 together with interest and costs, or in any sum whatsoever. (Assignment of Error IX; Tr. p. 28). Appellant likewise assigns error in the making and entry of judgment herein awarding judgment in favor of the appellee and against the appellant for the sum of $3,362.00, with interest and costs. (Assignment of Error X; Tr. p. 28).

ARGUMENT

In this brief, appellant will consider separately each of the four main categories into which its assignments of error have been segregated.

I. BAILMENT

Appellee's case in the District Court was predicated upon the theory that the relationship existing between the parties was that of bailor and bailee under a bailment for the mutual benefit of both. They offered no proof of negligence and argued that inasmuch as this was a case of bailment, they were "relieved of sustaining the burden of proof of showing lack of ordinary care, and plaintiff, by showing that its boat was returned to it damaged by the fire, has thrown the burden of proof on the defendant to show that it exercised ordinary care." The Court subsequently held "that the relation between the plaintiff and the defendant was that of bailor and bailee, under bailment to the mutual benefit of both parties". (Finding of Fact No. 3, Tr. p. 18).

In our opinion, this theory is not applicable, and no presumption of negligence on the defendant's part is raised, for the following reasons:

A. This is not a case of bailment in which such presumption arises because there was not a transfer of exclusive possession to the appellant.

B. Even if it was a bailment, the claimed presumption is not applicable because:

1. The showing that the damage occurred by fire overcomes any presumption of negligence and the burden of going forward with the proof of actual negligence remains with the plaintiff.

2. The complaint pleads certain specific and definite acts of negligence, and in such a case, the burden is on the plaintiff to establish the same without the aid of any presumption.

A. RELATIONSHIP NOT THAT OF BAILOR AND BAILEE

It is essential to the creation of a bailment that exclusive possession of the article involved be delivered over to the custody and control of the bailee.

The necessity of exclusive possession in the bailee is stated in 6 *C. J.* 1103, *Section* 23, as follows:

> "Such a full delivery of the subject matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, as will make him liable as its sole custodian to the latter in the event of his negligence or fault in discharging his trust without respect to the subject matter, and as to require a redelivery of it by him to the owner or other person entitled to receive it after the trusts of the bailment have been discharged."

A very complete annotation on the essentials of a bailment appears in 1 *A. L. R.* 394. The requirement of exclusive possession by the bailee is summarized in the following language, on page 395.

> "On the question of fact, whether or not there is a sufficient delivery in any given case, the general rule is that, in order to constitute such a delivery, there must be a full transfer, either actual or constructive, of the property to the bailee, so as to exclude the possession of the owner and all other persons, and give to the bailee, for the time being, the sole custody and control thereof."

In the case at bar there was no exclusive possession of the boat by the dry dock company at any time. While

the appellant had men working on it during the day, the crew of the vessel was also on board doing work. This is clearly shown by the log of the "Guard" (Plaintiff's Exhibit 4) which, for December 29th (the fire occurred early on the morning of the 30th), shows that seven men, constituting the crew, were on board performing routine activities and repair work. The log shows that the appellant's workmen left the vessel at 4:30 P. M. and it was further shown that two members of the crew were kept on board in charge of the vessel during the night. (Tr. p. 36, 38) The fact that the boat rested in appellant's dry dock, manned by, and in charge of, her own crew, does not place her in the exclusive possession of the appellant. The very fact that the regular crew stayed with the vessel both day and night negatives any claim of bailment. The control of the boat was at all times retained by the appellee.

This identical question was presented to the Circuit Court of Appeals for the 4th Circuit in *The Kennebec,* 1919, 258 *Fed.* 222. The Baltimore Dry Dock & Shipbuilding Co. libeled the steamship "Kennebec" for a repair bill. The vessel filed a cross-libel for damages sustained by it while on the libelant's dry dock, alleging that the dry dock company had failed to furnish steam to the boat, as a result of which certain water pipes froze and burst. Counsel for the "Kennebec" claimed that the relationship of the parties was that of bailor and bailee, but this contention was rejected by the Circuit Court of Appeals. The following statement of the law appears on page 224 of the reported decision:

> "Appellant says the law of bailment applies and cites cases illustrating its familiar principles. But an essential element of bailment is delivery to the bailee, and we think it plain that there was no such delivery in this case. The work undertaken by appellee was confined to the exterior of the hull, and had nothing to do with any other part of the vessel. The Captain continued in command and he and the crew stayed on board. In every substantial sense the ship remained in the control of her master, and the dock company certainly did nothing to interfere with that control or to prevent him from doing whatever he thought necessary to protect the machinery of the vessel. The doctrine of ordinary care of a bailee has no application."

This rule of law has always been followed in the State of Washington. In *Boe v. Hodgson Graham Co.*, 1918, 103 *Wash.* 669, 175 *Pac.* 310, appellant sought to recover for the loss of a boat, claiming that respondent was a bailee in sole possession and control of the vessel at the time it foundered. The Court held that the master of the boat was on board as appellant's representative, and therefore that no bailment existed and that no presumption of negligence on the part of the respondent could be indulged in, saying:

> "The possession of respondent, *not being exclusive,* the rule as to the burden of proof for which the appellant contends, does not apply. 6 C. J. 1158; *Bertig v. Norman,* 101 Ark. 75, 141 S. W. 201, Ann. Cas. 1913 D. 943; *North Atlantic*

Dredging Co. v. McAllister Steamboat Co., 202 Fed. 181." (Italics ours).

This same principle was referred to in *McDonald v. Perkins & Co.*, 1925, 133 *Wash.* 622, 234 *Pac.* 456, 40 *A. L. R.* 859. In holding that in the ordinary case of bailment the burden is upon the bailee to explain the loss of, or damage to, the subject of the bailment, the Supreme Court of the State of Washington, said.

> "The authorities are not agreed upon the question who has the burden of proof of explaining the disappearance of property from the possession of a bailee. The better rule, we think, is that adopted by the trial court. The rule has its foundation in necessity; a bailee, *having exclusive possession of property,* has also the exclusive means of knowing what becomes of it. In fact, he is the only one who can know, and having the exclusive means of knowledge, it is imposing upon him no undue hardship to require him to explain." (Italics ours).

In *Ex Parte Mobile Light & R. R. Co.*, 1924, 211 *Ala.* 525, 101 *So.* 177, 34 *A. L. R.* 921, the Court held, in sustaining a demurrer to the complaint, that a bailment is not created by leaving an automobile in an outdoor parking lot where a charge is made for the privilege, saying:

> "We find nothing in the complaint indicative that possession and control, actual or constructive, was surrendered to, or assumed by, the defendant. * * * An essential element of bailment is possession

in the bailee. His duties of reasonable care spring out of his possession."

An excellent statement of the law is found in *Broaddus v. Commercial National Bank*, 1925, 113 *Okla.* 10, 237 *Pac.* 583, 42 *A. L. R.* 1331. This case holds that the owner of an office building is not a bailee of the contents of a tenant's room outside of office hours. The Court reviews a great many authorities and concludes:

> "The rule is elemental that, in order to constitute a transaction in bailment, there must be a delivery to the bailee, either actual or constructive. It has been held that such a delivery of property must be made to the bailee as will entitle him to exclude for the period of the bailment the possession thereof, even of the owner. *Fletcher v. Ingram*, 46 *Wis.* 191, 50 *N. W.* 424. * * * The evidence, however, discloses that each of the defendants and their stenographer had a key to said offices and access thereto at all times. *Therefore one of the necessary elements of a contract for bailment is fatally absent, to-wit, such a delivery to the bailees as would entitle them to exclude for the period of the bailment the possession thereof, even of the owner.*" (Italics ours).

In *Kee v. Bethurum*, 1930, 146 *Okla*, 237, 293 *Pac.* 1084, the Supreme Court of Oklahoma held that a woman who rents out a room in her private home is not a bailee of property left in that room even during the renter's absence, saying:

> "The plaintiff was not excluded from possession

of the property and the defendant did not have the sole custody and control thereof. The most that can be said is that the property was under the joint control and in the joint custody of the plaintiff and the defendant. * * * There was no bailment of the property in question * * * ."

It is because of this feature of exclusive possession by the bailee in bailment cases that the Courts have frequently held that the redelivery of the property to the bailor in a damaged condition raises a presumption of negligence on the part of the bailee. The reason underlying this rule is that the bailee is the only one who can know the facts concerning the damage and that the bailor, being excluded from the property, is in no position to establish the cause of the loss. When the element of exclusive possession is absent, there is no bailment, and the presumption fails.

For other cases on this point, see:

Bertig v. Norman, 1911, 101 *Ark.* 75, 141 S. W. 201, *Ann. Cas.* 1913 *D* 943;

Atlantic Coast Line R. Co. v. Baker, 1903, 118 *Georgia* 809, 45 *S. E.* 673;

Blondell v. Consolidated Gas Co., 1899, 89 *Maryland* 1732, 43 *Atl.* 817, 46 *L. R. A.* 187.

Com. v. Doane, 1848, 1 *Cush.* (*Mass.*) 5.

Sherman v. Commercial Printing Co., 1888, 29 *Mo. App.* 31.

Wentworth v. Riggs, 1913, 159 *App. Div.* 899, 143 *N. Y.* 955.

Voland v. Reed, 1917, 164 *N. Y.* 19.

Matthews v. Carolina & M. W. R. Co., 1917, 175 N. C. 35, 94 S. E. 714, L. R. A. 1918C 899.

Outcault Advertising Co. v. Brooks, 1917, 82 Ore. 434, 158 Pac. 517, 161 Pac. 961.

Crouse v. Lubin, 1918, 260 Pac. 329, 103 Atl. 725.

Fletcher v. Ingram, 1879, 46 Wis. 191, 50 N.W. 424.

In the light of the foregoing authorities, we feel that it must be held that the relationship existing between the appellee and the appellant was not that of bailor and bailee, inasmuch as appellant did not have exclusive possession of the vessel. If, then, this was not a bailment, the liability of the appellant cannot be determined, as was the case in the trial court, by the application of rules pertaining to such a relationship, but it must be arrived at by a consideration of the rights and duties arising out of the express contract entered into between the parties.

B. IN NO EVENT IS PRESUMPTION OF NEGLIGENCE APPLICABLE

But even assuming that this is a case of bailment, the presumption so strongly urged upon the trial court by the appellee is still inapplicable. As previously pointed out, the theory of appellee's case was that appellant was liable on two grounds: first, that they were negligent in allowing the fire to spread to the "Guard" after it had been discovered, and second, that they had failed to furnish the vessel with fire protection as called for by the contract. In support of this first allegation, appellee contended that it was sufficient to show that

the boat was returned to it in a damaged condition and that the burden was then upon the appellant to prove that it had exercised reasonable care in protecting the same. It will be observed that no effort was made in appellee's case to prove negligence on the part of the dry dock company.

1. PRESUMPTION INAPPLICABLE WHEN DAMAGE IS CAUSED BY FIRE

It is well established, however, that the rule contended for by appellee is not applicable where it appears that the damage resulted from some cause not ordinarily or necessarily attributable to the bailee's negligence, such as fire or theft. In such cases, the burden of proof is upon the claimant to prove the negligence relied on.

This contract, of course, should be interpreted according to the law of the State of Washington, which, on this point, is stated very clearly in *Colburn v. Washington State Art Ass'n,* 1914, 80 *Wash.* 662, 141 *Pac.* 1153, *L. R. A.* 1915A, 594, as follows:

> "Counsel for respondent invoke the general rule that, in an action to recover damages against a bailee for goods placed in his possession, which goods are not accounted for in any manner and not returned to the bailor upon demand, the burden of proof, as against his presumed negligence, then rests upon the bailee. This rule was recognized by this Court in *Pregent v. Mills,* 51 *Wash.* 187, 98 *Pac.* 328, but it is not without its limitations in cases of loss by burglary, larceny, fire, and other causes which, from themselves, do not point to

negligence on the part of the bailee. In other words, when the bailee has shown loss from some such cause, he has met the prima facie case of negligence made against him by his failure to return the goods, and the burden of proof as to his negligence then rests upon the plaintiff as in any other case of alleged negligence."

A more recent statement of the law appears in *Burke v. Bremerton*, 1925, 137 *Wash.* 119, 241 *Pac.* 678, where it is said.

"The law, with reference to the liability of warehousemen, is well settled. A warehouseman is bound to exercise ordinary diligence only. *Colburn v. Washington State Art Ass'n*, 80 *Wash.* 662, 141 *Pac.* 1153, *L. R. A.* 1915*A*, 594. When, however, it is shown that the loss is occasioned by larceny, burglary, fire, or other cause, which of themselves do not point to negligence on the part of the bailee, the bailee has then met the prima facie case made against him by his failure to return the goods, and *the burden of proof as to negligence then rests upon the plaintiff, as in any other case of alleged negligence. Colburn v. Washington State Art Ass'n.* supra; *Firestone Tire & Rubber Co. v. Pacific Trans. Co.*, 120 *Wash.* 665, 208 *Pac.* 55, 26 *A. L. R.* 217; *Harland v. Pe Ell State Bank*, 122 *Wash.* 289, 210 *Pac.* 681; *McDonald v. Perkins & Co.*, 133 *Wash.* 622, 234 *Pac.* 456." (Italics ours).

The rule stated in the Washington cases referred to above is recognized by the Supreme Court of the

United States in *Southern Railway Co. v. Prescott,* 1916, 240 *U. S.* 632, 60 *L. Ed.* 836, 36 *Sup. Ct. Rep.* 469:

> "The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift. As it is the duty of the warehouseman to deliver upon proper demand, his failure to do so, without excuse, has been regarded as making a prima facie case of negligence. If, however, it appears that the loss is due to fire, that fact in itself, in the absence of circumstances permitting the inference of lack of reasonable precautions, does not suffice to show neglect, and the plaintiff, having the affirmative of the issue, must go forward with the evidence."

In support of this rule, the Court cites a considerable number of cases, including *Claflin v. Mayer,* 1878, 75 *N. Y.* 260, 31 *Am. Rep.* 467, from which the Supreme Court of Washington quoted extensively in the case of *Colburn v. Washington State Art Association, supra,* 1914, 80 *Wash.* 662, 141 *Pac.* 1153, *L. R. A.* 1915A 594.

The same rule is recognized, and additional authorities given, in 6 *C. J.* 1160. In two exhaustive annotations, 9 *A. L. R.* 559, *and* 71 *A. L. R.* 767, the decisions are collected and the general rule is stated to be as follows:

> "Using the term, 'burden of proof' in the sense of ultimate burden of establishing facts necessary to recovery, and not in the sense merely of a duty

> to 'go forward' with the evidence, the authorities in general hold that the burden of proof to establish negligence on the part of the bailee, where the property is destroyed by fire, is on the bailor."

Therefore, even assuming that this was a case of bailment, when it was made to appear that the damage resulted from fire, any presumption of negligence, or prima facie showing resulting from the fact of damage, was overcome, and the duty of affirmatively establishing appellant's negligence still rested on the appellee.

2. PRESUMPTION INAPPLICABLE WHEN SPECIFIC ACTS OF NEGLIGENCE PLEADED

Moreover, the presumption relied upon by appellee has no application for another reason, namely, because the acts of negligence relied upon are specifically pleaded.

Reference to the complaint discloses that appellee does not claim that it delivered the vessel into the exclusive possession of the appellant, but simply states that the appellant was employed to do some repair work on it, that while undergoing such repairs a fire occurred, (which fire is not claimed to have been caused by negligence), and that such fire spread to the vessel because of the negligence of the appellant. (Complaint, paragraph IV, Tr. p. 3) The complaint further sets forth in paragraph V (Tr. p. 4) other specific acts of default or breach of contract with respect to the furnishing of fire protection. Having alleged specifically the acts of negligence relied upon, to-wit: permitting the fire to spread, and failing to provide proper fire protection, such specific acts constitute the basis of the suit

which the appellee must establish. The pleading of such definite and specific acts of negligence is inconsistent with any theory of presumption.

This is clearly pointed out in *Delaware Dredging Co. v. Graham,* 1930, 43 *Fed. 2nd* 852, as follows:

> "In a cause of loss or damage, the libelant has a prima facie case if he shows that such loss or damage occurred while the subject of the bailment was in the sole and exclusive custody of the bailee. This showing, however, merely imposes upon the bailee the duty of going forward with the evidence. It does not, properly speaking, constitute evidence of negligence. When the bailee accepts this duty and shows how the loss occurred, the force and effect of the prima facie case disappears. Then, unless it affirmatively appears from the evidence so produced that the loss was caused by the negligence of the bailee, the burden reverts to the libelant (or, perhaps more properly, the burden originally upon him, is revived), and it becomes incumbent upon him to produce evidence of negligence on the part of the bailee; otherwise, his case fails. The result will be the same if, as in the instant case, the libelant does not choose to rest his case upon proof of delivery and failure to return, but elects to adduce evidence showing the circumstances under which the loss occurred. * * * In *Hildebrandt v. Flower Lighterage Co.* (*D. C. N. Y.*) 277 *Fed.* 436, 437, Judge Mack (orally) said: 'As I say, if there were no proof at all, except the handing over or the fail-

ure to return, they (bailees) would be liable; when there is proof of just what was done, even though cause of the particular damage is not shown, the burden of showing negligence remains on the libelant.' "

A good discussion of this principle is contained in *Metropolitan Electric Service v. Walker* 1924, 102 *Okla.* 102, 226 *Pac.* 1042, where the Court says:

"It would seem that where the loss occurred from fire, theft, burglary, or causes ordinarily held to be beyond the control of the bailee, and the plaintiff alleges that the loss occurred from these causes 'and by reason of the negligence of the bailee', the plaintiff must ordinarily follow up his proof of bailment, demand, and failure to return by proof also of the negligence of the bailee."

In a similar case, the Supreme Court of Washington made the following statement. (*Glacier Fish Co. v. North Pacific S. P. Co.*, 1924, 131 *Wash.* 426, 230 *Pac.* 410).

"It is unnecessary, as we view the facts of the case, to pursue this discussion for the reason that this case, to our minds, does not present one where a bailor is relying upon a prima facie case of negligence established merely by evidence of his delivery to the bailee of a bailment in good condition and a redelivery in a damaged condition, for, as we have already noted, the respondent produced positive testimony of a specific act of negligence and is not relegated to a prima facie showing."

We insist, therefore, that the relationship existing between the parties was not that of bailee and bailor, as found by the trial court. Moreover, we contend that even if there was a bailment in this case, the presumption contended for by appellee did not apply, and that the burden was still upon it to prove by a preponderance of the evidence that appellant was guilty of negligence in the respects charged. This burden they made no attempt to meet, being content to rely merely upon a prima facie showing of the return of the vessel in a damaged condition.

II. APPELLANT WAS NOT GUILTY OF NEGLIGENCE

In Paragraph IVof its complaint, (Tr. p. 3) appellee alleged:

> "That on said date a fire originated upon the premises of the defendant corporation, and because of the negligence of the defendant corporation, its officers and employees, said fire spread to the United States Coast Guard Cutter "Guard" while in the defendant's dry dock."

There was no charge that appellant was guilty of any negligence in connection with the origin of the fire.

> "Q. What is your practice with relation to maintaining a fire in this boiler room, and the conditions under which fire is maintained, or precautions that were taken about it? What is the occasion for any fire at all?
>
> "THE COURT: Is that material?

"MR. JONES: I do not know. I am not quite sure what counsel's contention is. If it is presumed that the fire arose from negligence, if that is his contention.

"THE COURT: I do not think the Court is interested. *The question is whether sufficient precaution was taken after the fire broke out.*

"MR. JONES: If your Honor does not regard that as material, I will withdraw it.

"THE COURT: *Is that the idea, Mr. DeWolfe?*

"MR. DeWOLFE. *I think that is right.*"

(Tr. p. 55 and 56, Italics ours).

The only question then is whether there was negligence on the part of the appellant in what was done or not done after the fire was discovered. Leaving aside, for the moment, any contractual liability in this regard, we submit that there is absolutely no showing of negligence in respect to any such act of commission or omission. It is not suggested that the appellant did anything which caused the fire to spread, and no evidence has been offered as to anything which the appellant might or could reasonably have done to have prevented it from reaching the "Guard". In the lower Court it was suggested that if the watchman had been in the boiler room when the fire started he could have put it out, but this, of course, is beside the point, and outside the issues of the case. It is not claimed that the watchman should have been in the boiler room, or that it was negligent for him not to have been there. The

allegation of negligence on which appellee relies is that the dry dock company was at fault in allowing the fire to spread to the "Guard" after its discovery. However, there is no evidence whatsoever that there was anything which the watchman could then have done to have prevented the spread of the blaze.

The fire was first noticed by the witness Gallagher (Tr. p. 67) who was not an employee of the appellant. (Tr. p. 67) At this time the flames filled the interior of the boiler room, but they had not yet broken through the walls. (Tr. p. 67) Gallagher ran to the watchman's office, which was about 125 feet from the boiler room (Tr. p. 61) and from which the fire was not visible, (Finding of Fact No. 3, Tr. p. 16) and notified Clark, the man on duty, and the only employee of the appellant in the plant. (Tr. p. 67) At the same time he telephoned Central, advising her of the blaze, and asking her to notify the fire department. (Tr. p. 61, 67) Clark immediately ran out and over to the north gate of the plant. (Tr. p. 61) This gate was the proper one for the fire department to use, in view of the location of the blaze in the yard, but it was closed and locked. (Tr. p. 61) Clark unlocked this gate and opened it so that the apparatus could get in without difficulty. (Tr. p. 62)

The watchman had been at the plant when other alarms had been turned in, and knew from experience that the first pieces of equipment could be expected to arrive on the scene in from three to five minutes. (Tr. p. 61, 62) For some reason, however, the fire depart-

ment did not immediately respond on this particular occasion, and did not arrive for a period estimated by various witnesses at from ten to twenty-five minutes. (Finding of Fact No. 3, Tr. p. 17, 45, 68, 69) This delay was so noticeable that Gallagher telephoned a second time. (Tr. p. 68) The trial court found that although the fire department's equipment would ordinarily reach the plant in from three to five minutes, on this occasion it did not get to the scene until fifteen to twenty minutes after the first call. (Finding of Fact No. 3, Tr. p. 17)

As soon as he had finished unlocking the gate so as to admit the fire department, the watchman went at once to the scene of the fire. (Tr. p. 62) By this time the blaze had broken out of the boiler room, and was spreading toward the joiner shop, which was an open structure without sides. (Tr. p. 62). Clark considered the advisability of using the 50-gallon chemical wagon kept in the yard, but concluded that it would be useless in view of the headway gained by the fire. (Tr. p. 63) He then attempted to reach a two-inch fire hose attached to a hydrant near the northwest corner of the joiner shop, but was unable to use it because of the flames and heat carried by the draft down under the ridge of the roof of this building. Tr. p. 62) At this time the two men from the "Guard" were playing a stream from the smaller hose on the fire, so that this was not available to him. (Tr. p. 62) Clark then noticed that the fire department was not responding

promptly, and was on his way to put in another alarm when the first piece of equipment arrived. (Tr. p. 63)

There is no contradiction of the watchman's testimony, and there is no proof that he could have done anything more than he did. Certainly no one could argue that it was negligence for him to first open the gate for the fire department, or that he should have left the fire department to get into the yard as best they could while he fought single-handed a blaze which, when first discovered, filled the interior of a twelve by sixteen-foot building.

After opening the gate, Clark concluded that it would be useless to undertake to use the chemical extinguishers because of the headway gained by the fire. He noticed that one hose was being played on the fire, and he made an effort to reach the large fire hose, but was prevented from doing so by the heat and flames. Being concerned over the fire department's failure to arrive he then went to put in another call for assistance.

All this, we submit, was proper and just what any other reasonable man would have done under the same circumstances. Appellee has never suggested, and we cannot imagine, that there was anything more that the watchman could have done. Neither can we see any signs of negligence in the things which he did, nor has the appellee ever made any specific accusations in reference thereto.

In this connection, it should be borne in mind that appellant's watchman expected, as he had a right to expect, that the fire department would arrive in from

three to five minutes after the first call. In considering whether he acted as a reasonable and prudent man would have acted under the same or similar circumstances, this Court should remember that his actions were based on this assumption. Had he known that the department would not arrive for from 15 to 20 minutes, he might have acted in a different manner. Because he did not anticipate this unusual situation, however, he should not be held to be guilty of negligence.

We submit, therefore, that there is absolutely no evidence of negligence on the part of the watchman, the only employee of the appellant who was in the plant at the time. Appellee charges no negligence prior to the discovery of the fire, which, when first noticed, filled the interior of the twelve by sixten foot boiler room, and it does not appear that after its discovery the watchman could have done anything reasonably calculated to have overcome it. It was then obviously a blaze requiring the attention of the fire department.

III. APPELLANT FURNISHED AMPLE FIRE PROTECTION TO VESSEL

As previously pointed out, appellee, in addition to charging that appellant negligently permitted the fire to spread to its boat, alleged that the dry dock company "failed to provide ample fire protection for said vessel". (Complaint Paragraph V, Tr. p. 4) The contract covering the repairs to the "Guard" (Plaintiff's Exhibit 1) contained the following paragraph relative to the matter of fire protection:

"GENERAL CONDITIONS — FIRE PROTECTION: It is clearly understood that the contractor agrees to furnish the vessel with ample fire protection *during the time in dry dock or on the marine way.*" (Italics ours)

Clearly this provision is not one of indemnity, making the appellant liable as insurer against any and every loss that may occur, for, if such were the intent, the contract would undoubtedly have provided that the contractor should assume responsibility for all damage, however occurring.

It is also very significant that this provision only applies "*during the time in dry dock or on the marine way.*" (Italics ours) Appellant was not required to furnish fire protection to the vessel when the latter was in the water.

As will be observed on reading the contract, (Plaintiff's Exhibit 1) appellant was called upon to do work both inside and outside the hull, requiring a total working time of fifteen days. Item 1 of the agreement, which covered the dry docking and work to be done at that time, indicates that this work was estimated to require only three days, so that obviously it was contemplated that the vessel would be out of the water for only a small portion of the entire time spent in the plant. While in the water, the "Guard" had its own pumping equipment, but this, however, was useless when the boat was in dry dock. J. H. Snydow, the officer in charge of the vessel, testified:

"Ordinarily we have fire hose for fire protec-

> tion on the boat, and have our own pumping equipment. We use 1½-inch hose. I do not know what pressure. * * * We could not operate our water system when on dry dock." (Tr. p. 39)

The fact, therefore, that appellant was required to furnish fire protection to the vessel only when it was out of the water indicates quite clearly, we think, that the purpose of the provision was to provide for the vessel the same character and extent of fire protection while out of the water that she would have on her own account while in the water—in other words to give her the equivalent of the protection afforded by her engines and pumps which she lost by reason of being on the floating dock.

A copy of the Regulations of the United States Coast Guard was put in evidence pursuant to stipulation of the parties (Tr. p. 11) and pertinent parts of the same are set forth in the Transcript of Record, pages 11 to 13. These Regulations require that vessels of the type involved be equipped with fire buckets (Sec. 1503, sub L), fire hose (Sec. 1563), and boxes of sand, scoops and portable fire extinguishers (Sec. 2054, sub. J). Apparently it was these requirements that appellee felt constituted ample fire protection for the vessel, and it would seem that they should constitute the standard which appellant would have to maintain under the contract. Of course the water buckets, sand boxes, scoops and chemical extinguishers provided by the boat, and which the inspection report (Plaintiff's Exhibit 6) establishes were there, were not affected by placing the

vessel on the floating dock. The only feature whose function was interfered with was the vessel's pump and fire hose, and it was to require appellant to furnish the equivalent of this protection that the provision referred to was obviously incorporated in the contract.

As far as the matter of fire protection furnished to the boat is concerned, therefore, the sole question is whether or not sufficient measures were taken by appellant to compensate the vessel for the loss of use of her own pump and fire hose. On this point the evidence is undisputed that a hose from 100 to 150 feet long (Tr. p. 34) with an inside diameter of one inch (Tr. p. 55) was furnished by the appellant for this very purpose, (Tr. p. 39, 43) that it was connected to a water main on the south side of the wharf just forward of amidships of the "Guard," (Tr. p. 34, 39) furnishing a pressure of 125 pounds per square inch, (Tr. p. 39, 54) and that the nozzle end was taken aboard the vessel. (Tr. p. 34, 35) This hose was capable of throwing a stream stated at all the way from 60 to 125 feet. (Tr. p. 55, 70)

This equipment was furnished by appellant for the express purpose of affording the "Guard" fire protection (Tr. 34, 39, 43) and was so accepted by J. H. Snydow, the officer in charge of the vessel, who testified on this point as follows:

> "We used it for our own protection on board the boat. We leave the end of the hose on board the "Guard" every night for our own protection." (Tr. p. 34)

It was hooked up, and Mr. Snydow tested it when he left, late in the afternoon before the fire.

> "The hose was connected when I left the evening before, the nozzle was just aport the pilot house." (Tr. p. 35) "I tried it every day and it was working all right, and there was water on the line. I used the water practically every day. There was a strong pressure." (Tr. p. 39)

Mr. Snydow, the officer in charge, considered that this hose was ample protection for his vessel. He testified.

> *"I considered that the hose would carry water enough to take care of a fire on board the "Guard."* (Tr. p. 40, Italic ours).

It seems to us that considering the purpose of this requirement in the contract, and the fact that the hose furnished by the appellant, and carried on board the "Guard" for its protection, was accepted as sufficient, without complaint or objection, and, as testified by the officer in charge, was considered by him as sufficient protection against any fire that might occur, that the defendant has fulfilled its obligation under this provision.

By the plaintiff's own showing, the facilities furnished were equivalent to those carried and considered by the vessel as sufficient for its own protection. It is not suggested that any other or additional equipment should have been furnished by the defendant to the vessel itself.

One of the most remarkable things about this feature of the case is that although appellee contends that the dry dock company did not furnish adequate fire protection to the vessel, it clearly appears that the crew of the boat made absolutely no attempt to use the facilities that were made available for this purpose. At no time did they make any use of the one-inch hose to protect their own vessel, even though a mere wetting-down of the boat would undoubtedly have kept it from scorching, thus preventing practically the entire damage. Even if apellant had placed a dozen fire extinguishers, and several additional hose lines aboard the "Guard," there is nothing to indicate that the two men on board the vessel at the time of the fire would have made any more use of them than they made of the one hose that was furnished. When the equipment that was made available for this very purpose was not used, what is there to indicate that if additional safeguards had been furnished, the crew would have resorted to them? The conclusion is irresistible that the same damage would have been sustained by the "Guard," no matter how many protective devices were furnished by appellant.

So far we have concerned ourselves principally with the fire protection afforded the vessel itself, as distinguished from that designed to safeguard the plant, though strictly speaking, it is probably the latter that we should be most concerned with in this case, inasmuch as the fire originated on the appellant's own property. If the fire had started on the "Guard" then

the question would be more particularly whether the equipment and facilities available for the protection of the vessel were sufficient, and this would involve the question discussed last herein. But where, as in this case, the fire started on the property of the dry dock company, the question of the sufficiency of the fire protection furnished relates rather to the safeguards afforded by the appellant for the care of its own property. If that protection was sufficient, according to reasonable standards, to protect the appellant's property from a fire originating thereon, then it was likewise sufficient to protect the property of others, including the "Guard," which could only be reached by communication of the fire through the property of the dry dock company.

On this point the trial court found that appellant's plant was adequately equipped with devices for protection against fire. See Finding of Fact No. 3, Tr. p. 15, 16, 17 and 18, which includes the following:

> "*That the plant of the defendant was equipped with modern and sufficient fire-fighting equipment for its own purpose,* consisting primarily of a number of chemical fire extinguishers located at various positions throughout the plant, and three 2½-gallon chemical extinguishers, separated by 20-foot intervals, were hung upon the south side of the posts supporting the south side of the joiner shop, and directly opposite said dry dock, and about thirty feet therefrom, and a 50-gallon chemical cart extinguisher was located upon the northerly side

> of said joiner shop; that said extinguishers were accessible and available for use, but the crew of the plaintiff had not been advised thereof by the defendant, nor by any other person advised or instructed in the use of such extinguishers, or given authority or permission to use the same; that a canvas covered fire hose and connection were located upon the northerly side of the joiner shed. * * * *The plant of the defendant was supplied with all necessary fire apparatus for its protection* * * *.*" (Italics ours)

In considering standards or requirements of fire protection, we think it is proper to take into account the protection afforded by the City's fire department, and the time within which the latter might be expected to respond to an alarm, which is shown to have been three or four, or not over five minutes. (Finding of Fact No. 3, Tr. p. 17, 56, 60, 61, 62). Obviously the precautions necessary to be taken in maintaining fire-fighting equipment or protection facilities on the premises would be much less where the City fire department was in a position to respond almost immediately, than if it were not available for an hour or so.

But in addition to the immediate availability of the City Fire Department, and besides the hose furnished for the protection of the "Guard," the appellant also maintained a two-inch fire hose connected to a hydrant on the wharf on the other side of the joiner shop, (Tr. p. 62, 70) which was capable of throwing a stream from 100 to 125 feet. (Tr. p. 70) It also maintained a

generous supply of chemical fire extinguishers located at various points throughout the yard, there being three 2½-gallon extinguishers located on the outer side of the supporting timbers of the open joiner shop immediately to the north of the "Guard," and about 20 or 30 feet away from the vessel. (Tr. p. 54) A large 50-gallon chemical extinguisher was located on the opposite side of this building, at the point marked "Y" on the plat introduced into evidence as Plaintiff's Exhibit 3B. (Tr. p. 54, 69) It was suggested that this latter was locked up at the time of the fire, but no proof was offered to this effect, and the positive evidence was to the contrary. (Tr. p. 57, 58, 63, 71) There was also a large 40-gallon extinguisher in another part of the plant. (Tr. p. 54, 69)

Mr. McLean, the president of the defendant company, testified that it had received frequent inspections and reports by the fire marshal's office and fire insurance companies, with whose recommendations the appellant had always complied. (Tr. p. 58, 59) The fire fighting apparatus maintained in appellant's yard was similar to that used in other plants of the same character. (Tr. p. 70).

As the trial court found, the plant of the appellant "*was equipped with modern and sufficient fire-fighting equipment for its own protection*"; it "*was supplied with all necessary fire apparatus for its protection.*" (Finding of Fact No. 3, Tr. p. 15, 17, 18. Italics ours)

There is no showing whatsoever that the damage to the "Guard" could have been prevented or lessened

had the dry dock company had any additional or different devices for fire protection. Nor does appellee suggest any other safeguards that might have been made available and which would have saved its vessel from damage.

Appellee does not contend that the dry dock company should have kept on hand, day and night, a fire-fighting crew to protect against the possibility of a fire. Such a requirement would be unreasonable, particularly when considered with reference to a small job such as this, involving a total of only $650.00.

Nor is it contended that appellant's practice of having one plant watchman was less than the care it should have furnished; in fact it is quite customary for a plant of this size and character to employ but one watchman, and if appellant's practice in this respect was sufficient, as seems to be conceded, the only remaining question was whether the man on duty at the time of the fire was negligent in his conduct after the blaze was discovered. This point has already been fully covered herein, and we submit that the man acted in a very reasonable and prudent manner under the circumstances.

We contend, therefore, that the fire protection furnished by the dry dock company was ample, not only as far as its own plant was concerned, but also in reference to the protection afforded to appellee's vessel. Certainly appellee has not sustained the burden of proof in showing that appellant did not furnish sufficient fire protection, and that this act of omission was the approximate cause of the damage sustained by the "Guard."

IV. FAILURE OF CREW TO PROTECT VESSEL

Appellant, in its answer, and at the trial, raised as an affirmative defense the contention that the crew of the "Guard" made no effort to save or protect their vessel, and that, had they made any reasonable efforts so to do, as required by their duty, by the Coast Guard regulations, and by common prudence, their boat would have been saved from any injury. We seriously contend that such damage as was sustained by the "Guard" was directly attributable to, and resulted from, the failure of the crew of the vessel to take proper precautions for the safety of their boat, and that consequently appellant is not responsible therefor.

The crew of the "Guard" was at all times under a definite legal duty to prevent or minimize the damage to the vessel, and this duty was entirely disregarded. The rule of law applicable to this situation is stated in Ruling Case Law as follows:

> "It is a fundamental rule that one who is injured in his person or property by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize the resulting damage, and that to the extent that his damages are the result of his active and unreasonable enhancement thereof, or are due to his failure to exercise such care and diligence, he cannot recover; or, as the rule is sometimes stated, he is bound to protect himself if he can do so with reasonable exertion or at trifling expense,

and he can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided." 8 R. C. L. 442, Sec. 14.

"Under the rule requiring the injured party to use reasonable efforts to lessen the resulting damage in cases of wrongful injury to property, it is the duty of one whose property is threatened with injury to take reasonable precautions and to make reasonable expenditures to guard against such injury; and if he fails to do so, and such precautions and expenditures would have protected the property, then he cannot recover the value of property destroyed." 8 R. C. L. 446, Sec. 16.

This same duty was likewise placed upon the crew by the official Regulations of the United States Coast Guard. (Tr. p. 11-13) These regulations contain, among others, the following provisions:

"They shall see that the regulations concerning lights in the storerooms to which they have access are strictly observed, *and that every precaution is taken to prevent fire or other accident.*" (Regulations, Sec. 1389, sub-Sec. 4, Tr. p. 12. Italics ours)

"*Every proper precaution shall be taken to guard against fire, and each crew shall be proficient at fire drill.*" (Regulations, Sec. 1503, sub-Sec. K. Tr. p. 12. Italics ours)

Appellant contends that the members of the crew of the "Guard" breached this legal duty in at least two respects, viz.:

1. In failing to use the one-inch hose to protect their own vessel.

2. In failing to cut the floating dry dock on which their vessel rested, loose from the wharf so that it would drift across the waterway, and out of the path of the flames.

1. CREW FAILED TO USE HOSE

We have already commented herein on the fact that appellant furnished to the "Guard" a section of hose from 100 to 150 feet long, with an inside diameter of one inch, and connected to a water main having a pressure of 125 pounds per square inch. This was made available to the "Guard" for the express purpose of protecting the boat from fire, and its commanding officer accepted it and considered it sufficient for that purpose.

When a fire finally occurred, however, the crew then on duty made absolutely no effort to use either this equipment or any of their boat's own fire-fighting devices to protect the vessel. (Tr. p. 41, 48) Instead, on being awakened, they immediately took the hose from the "Guard" and went with it onto the wharf, where they attempted to extinguish the blaze. (Tr. p. 41, 43, 44, 48) At that time the fire was breaking out of both the top and sides of the boiler room, and flames were jumping from fifteen to twenty feet into the air. (Tr. p. 42) The water proved ineffective (Tr. p. 41, 43, 44) and after the men had expended five to seven minutes (Tr. p. 44) in this manner, they realized that the fire was spreading to the joiner shop. They then

dropped the hose (Tr. p. 43, 44, 48) and went into this building for the purpose of getting, and carrying to a place of safety, a small dinghy, or lifeboat, belonging to their vessel. (Tr. p. 41, 42, 43, 44, 48) Nothing further was ever done by them with the hose.

Appellant does not want to appear ungrateful in criticizing the efforts of the crew to extinguish the fire on its wharf, but it does seem that the men showed a great lack of diligence and care in protecting their own boat. It was their absolute duty to immediately take some one of the simple precautions that would have saved the "Guard" from damage. It should have been obvious to the members of the crew, when they got on the wharf and saw that the blaze filled the interior of the twelve by sixteen-foot boiler room and that flames were breaking through the building and jumping from fifteen to twenty feet into the air, that they could not affect the fire with their hose. It was simply a waste of time for them to stand there for from five to seven minutes, and pour water on the blaze. Even when they realized the futility of their acts, however, it still did not occur to them to take any immediate steps to protect their own vessel. As Louis LaPlace testified:

> "Q. Did it occur to you to turn the hose on the "Guard" so as to keep it from catching fire?
>
> "A. No, sir." (Tr. p. 47)

It should be remembered that the principal damage suffered by the vessel was that it was scorched and charred by the heat. (Tr. p. 48, 49) The only parts of the vessel that burst into blaze were the mast, the

side of the wheel-house, and a canvas tarpaulin over the engine room. (Tr. p. 44, 48) Certainly the greatest part, if not all, of this damage could have been easily prevented had the crew used their hose in wetting down their own vessel.

2. CREW FAILED TO CUT FLOATING DOCK ADRIFT

Appellant's chief complaint, however, is that the crew delayed for a period of from fifteen to twenty minutes before cutting the floating dry dock loose from the wharf so that it could drift across the waterway and out of the path of the flames. There was one hundred feet of open water (Tr. p. 53) between the edge of the wharf and the row of piles on the south, and had such action been taken promptly, or even within the first ten or twelve minutes after the crew had been aroused, the damage could have been entirely avoided. As previously explained, the men spent the first five or seven minutes in attempting to extinguish the fire, before they realized that it was beyond control and was spreading to the joiner shop. Since this building was directly opposite the "Guard" the danger to it, and to the dinghy stored inside, was equally a danger to the larger vessel. The members of the crew testified that the first they did not believe the "Guard" to be in danger, but that at this point they changed their minds, concluding, however, that they still had time enough to save both the dinghy and the "Guard" (Tr. p. 44) The men thereupon dropped the hose (Tr. 44) and went into the joiner shop, picked up their dinghy, and carried the same about 100 or 125 feet farther

down the wharf to a point alongside the machine shop. (Tr. p. 49) This, they estimated, only required about three minutes, (Tr. p. 44) but it probably took considerably longer.

The men then returned to the "Guard" for the purpose of moving the floating dock on which it rested, across the waterway. (Tr. p. 42, 43, 44) By this time fifteen or twenty minutes had elapsed since the crew had first gone on the wharf, and the stanchions of the dry dock had just taken fire. (Tr. p. 41, 43) About two minutes later the first flames broke out on the "Guard." (Tr. p. 43) The witness Louis La Place testified:

> "I do not know just how long before the flames got to our boat, but I would say around 15 or 20 minutes at the most." (Tr. p. 43)

Each man cut loose one end of the floating dock, and as La Place testified, "it just drifted across the small passageway" (Tr. p. 42) to a point where it was out of the path of the flames. They were then able to put out the fire on their boat by taking buckets and dipping water out of the lake. (Tr. p. 42, 44, 49)

There is absolutely no reason why this action could not have been taken immediately, and had it been, the vessel would have been saved from all damage. The members of the crew frankly admitted that there was no reason why they could not have done this in the beginning, and confessed that such action would have saved their boat. La Place testified:

"Q. If you had cut your boat loose immediately, you would have avoided your damages?

A. I did not figure when I first stood there that it would burn the boat up. It was not any of my particular business to move the dry dock anyway.

Q. If you had cut the boat loose immediately you would have been far enough away not to be burned?

A. We could only get over here (indicating).

Q. You would not have been burned here (indicating)?

A. The stern might have got on fire.

Q. Well, at any rate, if you had cut her loose immediately, she would have had plenty of time to have drifted across here (indicating) before the fire got too hot?

A. *We probably could have if we had pushed it right away.* (Tr. p. 46. Italics ours)

Henry Schafer testified:

"If we had started at once to cut the 'Guard' from the dock perhaps we could have got it away without damage, but we did not think of it. Mr. La Place said we had better get the dinghy out." (Tr. p. 49)

The commanding officer, Mr. Snydow, testified that the two men on board were sufficient to handle the vessel as she rested in dry dock, and move the latter if necessary. (Tr. p. 38, 39) On this subject he said:

> "In my judgment two men were sufficient to handle the vessel as she rested in dry dock, and to move the dry dock if necessary. I did not think we had the right to move the dry dock. I considered two men sufficient to extinguish any fire or take care of anything out of the ordinary that would occur on board the 'Guard.' I think two men were sufficient to cut the dock loose, and guide the dock under the circumstances that existed. *I do not know of any reason why the two men on board could not have cast off the line and immediately moved the dock away from the scene of the fire.*" (Tr. p. 38, 39. Italics ours)

Mr. Cutting, manager of the dry dock company, testified that one man could move a loaded floating dock. (Tr. p. 55) Mr. Bale, the company's dock master, likewise testified that such a floating dock could be moved by one man, and stated that they never used more than two. Tr. p. 70, 71) He also said that there were poles easily available at the time of the fire with which to move the floating dock, and that it would have only taken five or six minutes to have pushed the latter across the waterway. (Tr. p. 70, 71)

In this particular instance it would not even have been necessary for the crew to have pushed the dock, as the wind would have carried it across the waterway without assistance, once it was cut loose. The evidence is conclusive and the trial court found (Finding of Fact No. 3, Tr. p. 17) that at the time of the fire the wind was from the northeast, that is, from the fire directly

toward the "Guard." Not only did the wind help move the floating dock after it had been cut loose from the wharf, but prior to that time, it blew the heat and flames toward the "Guard," which resulted in the scorching and charring of the vessel. This very fact should have indicated to the members of the crew, when they first came on deck, that their vessel was in danger, and they should have immediately cast off the lines and drifted away.

It is true that these men testified, as a part of appellees, case, that the wind was blowing in just the opposite direction, that is, from the southwest, and consequently that they did not think that they were in any danger. In fact, the trial Court commented on this evidence at the close of appelle's case, in denying appellant's motion for a dismissal. The Court at that time stated that in view of the direction of the wind, the men acted in a very prudent and reasonable manner.

However, evidence subsequently introduced showed conclusively that this was not the fact, but rather that the wind was blowing from the fire towards the vessel. Mr. Cutting testified that a building on the north side of the boiler room, and only 15 feet away from it, was not touched, (Tr. p. 55) indicating that the fire was being blown in the opposite direction. He also testified that when he arrived at the plant at 5:30, a half hour after the fire broke out, the wind was from the north. (Tr. p. 55) Mr. Gallagher, who discovered the fire, stated that the wind was blowing from the boiler room toward the "Guard," (Tr. p. 68) and Clark, the watch-

man, testified to the same effect. (Tr. p. 63) There was no positive evidence to the contrary.

That the evidence of the appellant's witnesses and the finding of the Court on this point is correct is confirmed by a reference to the log of the "Guard" (Plaintiff's Exhibit 4). Under date of December 30th the following notation appears:

> "The lines holding the dry dock were cut, and *with the assistance of the wind,* the dry dock was got clear of the wharf." (Italics our)

This evidence, appearing in appellee's own records made at the time, should conclusively establish that the wind was from the fire towards the boat.

This fact is very significant. In the first place, it entirely changes the burden of the duties which rested on the members of the crew. It is one thing to feel safe against a fire when the wind is blowing it in the opposite direction, but it is quite a different and more serious matter when the wind is blowing the fire toward one. That such was the case here is evidenced from the testimony and the physical circumstances. In the face of such a fact, how can it be said that the men charged with the duty of protecting the boat, and who admitted that they could have protected it by simply cutting it loose and shoving off from the wharf, acted in a reasonably prudent manner when they neglected this obvious duty for from fifteen to twenty minutes, and when they took time to save their small boat from apparent danger, although, as they frankly admitted,

(Tr. p. 44) the same danger equally threatened the larger vessel.

That they would have been out of danger, and thus saved their boat, had they done this sooner, is evidenced by the fact that as soon as the floating dock drifted across the waterway, they were able to take buckets and put out the fire which was on the side which was still toward the blazing wharf. Obviously, if they could do this, the boat itself would not have caught fire at that distance.

It may be conceded that the members of the crew of the "Guard" acted sincerely and as they thought best, but a good intention is not a legal excuse. Admittedly they spent from fifteen to twenty minutes before cutting their vessel loose, and admittedly they could in this time have moved it out of danger and avoided the damage, had they seen fit to do so. The principle that governs is not whether they acted in good faith in something else that they did, but whether, by the exercise of ordinary diligence, they could have moved the vessel to a point of safety and avoided the damage. That they could have done so is a point upon which the evidence is conclusive.

We contend, therefore, that the fact that the crew of the "Guard" failed to take even the simplest precautions for the protection of their boat when the latter could easily have been completely protected, constitutes a breach of the duty and obligation placed upon them by law and the regulations under which they were acting. Appellee was bound to protect its property if

it could do so with reasonable exertion and having failed to do so it is not entitled to recover herein.

CONCLUSION

Bearing in mind that this is not the case of one who is an insurer against damage, we submit that the evidence is wholly insufficient to render the appellant liable. The damage itself is not proof of negligence or breach of contract, but the burden is upon the appellee to prove, by a clear preponderance of the evidence, that the appellant was either guilty of negligence in one or more of the respects charged, which negligence was the proximate cause of the damage to the "Guard," or that the appellant breached its contract to furnish the vessel with ample fire protection while on the dry dock, and that such breach of contract was a proximate cause of the damage complained of.

In our opinion the relationship existing between the parties in this case at the time of the fire was not that of bailor and bailee, and we feel that the trial court erred in holding that this was a case of bailment, and in applying the rules of liability applicable to such a situation. We insist, moreover, that even if this were a bailment, the fact that the vessel was returned to the appellee in a damaged condition would not raise a presumption of negligence on the part of the appellant, but that the burden would still be upon the appellee to prove the allegations of its complaint by a fair pre-

ponderance of the evidence. This, of course, it made no effort to do, at least insofar as the question of negligence was concerned, being content to merely rely upon a prima facie showing.

Appellee does not allege any negligence prior to the discovery of the fire, and appellant's testimony clearly indicates that after the blaze was first noticed, everything possible was done to prevent its further spread. There is absolutely no showing that anything more could have been done that could reasonably be calculated to have held the fire in check.

Appellee charges that appellant did not furnish the vessel with ample fire protection, as required by the contract. The evidence shows, however, that the purpose of this provision was to give the vessel, when on the dry dock, protection equivalent to that which she had while in the water. When on the dock the "Guard" did not have the use of its own pump and fire hose, and to replace this a lengthy piece of hose connected to a 125-lb. water main, and capable of throwing a stream from 60 to 125 feet, was furnished to the vessel. This was regarded by the latter's commanding officer as being sufficient to protect the boat from fire, but no effort was made by the members of the crew to use this equipment when their vessel was threatened. Moreover, the evidence indicates that the vessel would have suffered the same fate no matter how many protective devices were supplied to the "Guard" by the appellant.

Appellee does not seriously question the sufficiency of the emergency fire-fighting equipment kept by the appellant for the protection of its own plant, and in fact it appears that this was modern and sufficient, and compared favorably with that of other similar yards in the locality. There is no suggestion that anything else should have been furnished, or that any other equipment might have been provided which could have been used in successfully combatting the fire after its discovery.

We contend that not only has appellee failed to prove its own case, but that it appears that the damage to the "Guard" was occasioned solely by the inattention and neglect of duty shown by the members of the vessel's own crew. It is evident that they could very easily have saved their boat from any damage whatsoever by merely cutting the lines that held the floating dock to the wharf, and allowing the wind to drift them across the waterway to a point of safety. This they neglected to do for a period of from fifteen to twenty minutes. Even when they realized that the "Guard" was in danger, approximately seven minutes after they had first gone on the wharf, they took considerable additional time to carry a small lifeboat out of the path of the same flames that were even then reaching toward their vessel.

We feel, therefore, that it is impossible to escape the conclusion that appellant was not guilty of any negligence or breach of contract in this matter, but that the proximate cause of the damage to appellee's boat was

a lack of diligence on the part of the members of its own crew. We accordingly contend that the judgment of the United States District Court for the Western District of Washington, Northern Division, should be reversed, and that the appellee's action should be dismissed.

Respectfully submitted,

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 7569

LAKE UNION DRY DOCK & MACHINE WORKS,
A Corporation,

Appellant,

—*vs*—

UNITED STATES OF AMERICA,

Appellee.

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

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SUBJECT INDEX

TABLE OF CASES CITED

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NO. 7569

LAKE UNION DRY DOCK & MACHINE WORKS,
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Appellant,

—vs—

UNITED STATES OF AMERICA,

Appellee.

On Appeal From a Judgment of the United States District Court
for the Western District of Washington,
Northern, Division

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

While the statement of the case as presented in appellant's brief is subject to no correction, a more complete statement of the case is deemed essential to a proper presentation of appellee's argument in support of the judgment from which appellant prosecutes this appeal.

On or about the 18th day of November, 1931, appellee entered into a written contract with the appellant, a corporation operating a dry dock and ship repair business on Lake Union, at Seattle, Washington. Under the terms of this contract the appellant agreed to make certain repairs on the United States Coast Guard Cutter "Guard." (Tr. 14, 76, 77) The contract (Appellee's Exhibit 1) contained the following provision:

> "*General Conditions.* Fire protection. It is clearly understood that the contractor agrees to furnish the vessel with ample fire protection during the time in dry dock or on the Marine Way." (Tr. 14)

In pursuance to the contract, the appellant placed the vessel "Guard" on a floating dry dock 32 feet wide by 70 feet long. (Tr. 47) This floating dry dock was

moored in an open waterway on the south side of a wharf, which ran in a general easterly and westerly direction out into Lake Union. This wharf formed the north side of the waterway referred to, which waterway was approximately 100 feet wide, being bounded on the south by a row of piling running parallel to the wharf. To the north of the dry dock, and located upon the wharf against which the dry dock lay, and extending in an easterly and westerly direction at a distance of about 30 feet from the southerly side of the wharf, was an open woodworking shed known as a joiner shop, which extended parallel to the dry dock and to a distance of approximately 30 feet beyond its easterly end. Fifteen feet east of this joiner shop and on the same wharf was a boiler room with an approximate dimension of twelve feet by sixteen feet. This latter building was thus in a northeasterly direction from the floating dry dock and was approximately 50 feet distant therefrom.

Appellant's plant was equipped with fire-fighting equipment consisting primarily of a number of chemical fire extinguishers. Three two-and-one-half-gallon chemical extinguishers separated by twenty-foot inter-

vals were hung upon the southerly side of the posts separating the south side of the joiner shop and directly opposite the floating dry dock. (Tr. 54) A fifty-gallon chemical fire extinguisher was located upon the northerly side of the joiner shop. (Tr. 54, 69) A canvas covered two inch fifty foot fire hose and connection was also located upon the north side of the joiner shed and approximately 125 feet from the vessel "Guard." (Tr. 70) Extending from the water system of appellant's plant to the wharf adjacent to the dry dock was a one inch water pipe connection to which a 100 foot one inch hose was attached. (Tr. 34, 54) The primary purpose of this one inch hose was the washing of the sides of the vessels and ships while in dry dock, and was not such a hose as ordinarily used for fire protection. (Tr. 40, 54) The engines of the "Guard" while undergoing repairs in the dry dock were dismantled and part of her fire equipment consisting of a one and one-half inch hose and water pumps were rendered useless. (Tr. 35, 39, 41) The nozzle of the one inch hose was extended to the "Guard" for its own protection while on dry dock. (Tr. 34, 35, 40, 43)

On the night of December 29th, and during the early morning hours of December 30, 1931, the appellant had but one employee, a night watchman, on duty at its plant. (Tr. 56, 61) The principal duty of this employee was that of making hourly rounds of appellant's plant and punching the several clocks situated at various points. (Tr. 61) This operation consumed approximately fifteen minutes, and appellant's night watchman spent the remaining forty-five minutes of each hour in the dock master's office situated approximately 125 feet from the boiler room. (Tr. 61) At about the hour of five A.M. on December 30, 1931, a fire was discovered in the boiler room of appellant's plant by a man named Gallagher, not an employee of appellant, who lived on a barge moored nearby. (Tr. 61-67) Gallagher notified appellant's watchman, who was then in the dock master's office reading a newspaper and who had not made a round of appellant's plant for approximately forty-five minutes, of the existence of the fire. Gallagher then telephoned an alarm to the fire department. (Tr. 61, 65, 67) Upon being notified of the fire, appellant's night watchman went to the entrance gate into appellant's plant and opened the

gate for the fire department to enter. (Tr. 61, 67) Usually the first equipment of the fire department would respond to this location in from three to five minutes, but on this occasion the equipment did not arrive for ten or fifteen minutes. (Tr. 61, 62, 63, 68) At the time of the fire there were two members of the crew quartered on the vessel "Guard." (Tr. 36, 38, 41, 48) Shortly after the fire broke out in the boiler room these men were awakened by Gallagher (Tr. 67), and proceeding from their own vessel to the wharf took the one inch hose, the nozzle of which had been placed on the bow of the "Guard" for its own protection, turned on the water, and attempted to quench the fire in the boiler room. (Tr. 41, 48, 49) They were unable to stop the fire in the boiler room, and the fire spread to the joiner shop in which was stored inflammable material, and a dingy belonging to the "Guard" was stored about forty feet from the end of the shop. (Tr. 41, 48, 49, 50, 57) Finding that they were unable to stop the fire, the two seamen removed the dingy from the shop and carried it to a place of safety. (Tr. 41, 44, 48) On returning to the "Guard", it was discovered that the fire had spread to the dry dock, and thereupon

the two men cut the dry dock loose, and, with the aid of a slight wind which had blown the fire to the "Guard", moved the dry dock south across the waterway where the blaze on the "Guard" was extinguished. (Tr. 42, 43, 44, 48, 49) Approximately fifteen or twenty minutes elapsed between the time the two seamen were awakened by the fire and the time the dry dock was cast adrift from the wharf. (Tr. 43) The night watchman did not go to the "Guard", nor did he use the chemical fire extinguishers, or request the two seamen to use them. (Tr. 41, 42, 62, 63, 64, 69) The two seamen did not see appellant's watchman or receive aid from any other person. (Tr. 41, 42) The crew of the "Guard" had received no instructions with regard to the use of appellant's fire-fighting equipment. (Tr. 39, 54)

By reason of the fire the vessel "Guard" was badly scorched, necessitating the replacement of a planking and the making of other repairs, the expense of which amounted to the sum of $3,362.00. (Tr. 36, 38) Suit was instituted by appellee against the appellant to recover the sum of $3,362.00, it being alleged that the appellant had failed to provide ample fire protection

as required by the contract of November 18, 1931 (Appellee's Exhibit 1), and further that the appellant was negligent in permitting the fire to spread from its plant to the vessel "Guard." (Tr. 1 to 5)

In its answer appellant admitted the fire and the damage to the vessel "Guard", but denied negligence and alleged that it had furnished ample fire protection in accordance with the terms of the contract, and as an affirmative defense alleged that the crew of the "Guard" had ample opportunity to move said boat to a position of safety and they were guilty of a breach of duty in failing to do so. (Tr. 5 to 8)

The case was tried by the Court without the intervention of a jury in accordance with the stipulation between parties. (Tr. 10) Appellant's written motion for a judgment of dismissal, interposed at the conclusion of all the evidence, was denied. (Tr. 75) Proposed findings of fact and conclusions of law were submitted by both appellant and appellee. (Tr. 76-83) Subsequently, the Court made and entered findings of fact and conclusions of law in the case. (Tr. 13, 18) Appellant excepted to a number of these findings and conclusions, as well as to the failure of the Court to

make and enter several of the findings of fact which it had proposed. (Tr. 83, 90) The Court failed to make further findings of fact and conclusions of law. (Tr. 90) Appellant excepted to the Court's rulings. (Tr. 90) All of appellant's exceptions were allowed by the Court. (Tr. 90)

The Court entered judgment in favor of appellee and against appellant in the sum of $3,362.00, together with interest thereon at legal rate, from March 12th, 1932, plus the legal costs. (Tr. 19-20)

This is an appeal from that judgment of the United States District Court for the Western District of Washington, Northern Division, entered upon the 12th day of June, 1934, by the Honorable Jeremiah Neterer, Judge.

ASSIGNMENTS OF ERROR

The assignments or specifications of error set forth in appellant's brief are all predicated upon certain findings of fact made and entered by the Court, and its refusal and failure to make and enter various findings of fact proposed by appellant. The assignments under which it is contended that the Court erred

are assembled under four main headings as follows:

1. In holding that the relation existing between appellee and appellant at the time of the fire was that of bailor and bailee.

II. In holding that the appellant did not exercise ordinary care in protecting the "Guard" after the fire was discovered.

III. In holding that the appellant did not furnish the "Guard" with the fire protection called for by the contract.

IV. In failing to hold that the crew of the "Guard" breached their duty to protect their vessel.

Each of the foregoing main categories into which appellant has segregated its assignments of error will be taken up in this brief in the order in which they are set forth, except those assignments under the main headings numbered II and III, which will be considered together under the heading, "Apellant failed to furnish the "Guard" ample fire protection in accordance with the contract and was guilty of negligence."

ARGUMENT

1. RELATION OF BAILOR AND BAILEE EXISTED BETWEEN APPELLANT AND APPELLEE, AND THE BURDEN OF PROOF WAS ON APPELLANT TO SHOW IT EXERCISED ORDINARY CARE.

It is contended by appellant that the Court's finding "that the relation between plaintiff and defendant was that of bailor and bailee under bailment to the mutual benefit of both parties" (finding of fact number three, Tr. page 18), constituted error by reason of the fact that exclusive possession of the vessel "Guard" had not been delivered by appellee to the control and custody of the appellant. The evidence relied upon in appellant's crew remained on board the "Guard" while in dry dock during the daytime engaged in routine activities, while two members of its crew remained on board the vessel at night. It is further urged that even though a bailment existed between the parties, there was no presumption of negligence on the part of the appellant for the following reasons.

1. The showing that the damage occurred by fire overcomes any presumption of negligence, and the burden of going forward with the proof of actual negligence remains with the plaintiff.

2. The complaint pleads certain specific and definite acts of negligence, and in such a case the burden is on the plaintiff to establish the same without the aid of any presumption.

The Circuit Court of Appeals for the Second Circuit, in the case of *Pan-American Petroleum T. Co. vs. Robbins D. & R. Co.*, (1922) 281 Fed. 97, were confronted with similar questions. This was a libel based on a breach of contract and alleged negligence of the respondent dry dock company in failing to make certain repairs on the steamer George E. Paddleford in a careful and workmanlike manner. Shortly after the vessel left the respondent's dry dock, and while she was turning in the Erie Basin, it was found that her engine telegraph system, which had been the subject of the repairs, was defective. The action was instituted to recover damages the vessel was forced to pay to another vessel with which it had come into collision

as a result of the defective telegraph. The appellate court reversed the lower court's findings that the negligence alleged in the libel had not been proven.

1. With reference to the argument advanced by respondent Dry Dock Company that it did not have exclusive possession of the vessel because several of the libelant's officers remained on the ship while undergoing repairs, the Court said:

> "The respondent urged below and in this court that it was not called upon to explain the condition of the telegraph, because it did not have exclusive possession, inasmuch as during the time the ship was being repaired some of the officers were on board the boat. * * * It will be admitted that the rule which raises a presumption of negligence in the bailee, where goods are delivered in good condition and are returned in bad condition, does not apply if the possession of the bailee has not been exclusive of the bailor. * * *But it is to be observed that the bailment in this case was that classed as 'Locatio Operis Faciendi'; there being work and labor to be performed on the thing delivered. * * *It needs no citation of authorities to establish the elementary principle that where skill is required in performing the bailee's undertaking as in the case of the work to be done on the electrical apparatus of this steamship, the bailee must be understood to use a degree of skill adequate to the performance of his undertaking."

2. It was likewise urged that as in the case at bar, no negligence was proven. The Court held that in a tort action based wholly upon negligence, the burden was upon the libelant to prove negligence, but this was not so in contract, the rule being stated as follows:

> "It is true that the libel in the case now before us asserts negligence and the answer denies that negligence existed, and the District Judge has held that the respondent's negligence has not been proven. * * *But we do not base the decision of this case on the ground of the respondent's negligence. It is necessary to keep in mind, what the Court below failed to note, that this suit is brought on contract; that it is alleged that libelant delivered the ship into the respondent's possession under an agreement that it would execute certain work. * * *The burden was on the libelant to prove the contract, and that at the time the respondent delivered back the ship the telegraph was not properly adjusted and in good working condition. This burden was sustained. The presumption then arose that the respondent had not performed its contract, and was responsible for the condition in which the telegraph then was. The burden then rested on the defendant to overcome this presumption, and to establish by a preponderance of the evidence that it had fully performed its agreement, * * * ."

In the case of *International M. M. S. S. Co. vs.*

V. W. & A. Fletcher Co., (C.C.A. 2nd) 1924, 296 Fed. 855, the facts were quite analagous to the facts in the instant case. The libellant Steamship Company commenced an action in tort against respondent dry dock company to recover for damages sustained by the S. S. St. Louis while undergoing repairs in dry dock by support of this contention is the fact that a portion of reason of fire. It was alleged that the respondent dry dock company was negligent in using an open flame blow torch near highly inflammable paint remover which was being used to remove the paint on the grand stairway of the S. S. St. Louis. The evidence revealed that employees of libelant were doing other work on the vessel, but that the fire originated in a portion of the ship under respondent's control. The lower court's judgment in favor of libelant was sustained, and in holding that there was a presumption of negligence, the Court stated:

> "The contract for reconditioning the S. S. St. Louis and other vessels belonging to libelant was one of bailment * * * and respondents, the bailees, were to do the work with their own servants at their own yard. That contemporaneously the libelants were to do and were doing other work is

immaterial. The portion of the ship where fire broke out was wholly under respondents' control."

> "Undoubtedly the general rule is that negligence is never presumed, and he that alleges it must prove the same; yet where one receives a chattel in certain condition, and redelivers it with marks of injury that only culpable negligence would probably cause, 'it is the bailee who should open his mouth and make explanation to relieve himself;' and certainly slight evidence under such circumstances will shift the burden of evidence."

It will be noted in the foregoing cases that although specific acts of negligence are alleged in the libel, the Court held this to be a case of bailment, and the libelant by showing that its vessel was returned to it in a damaged condition threw the burden of proof on respondent to show that it exercised ordinary care.

Again in the case of *Newport News Shipbuilding and Dry Dock Co. vs. United States*, 1929, (C.C.A. 4th) 34 Fed. (2d) 100, where a shipyard company was held liable on the ground of negligence for a fire occurring on the S. S. America which was being repaired at its yard, it was held that the fact that a considerable part of the crew of the ship remained aboard did not effect the question of liability unless

the fire occurred in the part of the ship which they occupied. Quoting from the Court's opinion:

> "The ship had been delivered to the shipyard, and at the time of the fire was lying moored at the shipyard's dock. The fire broke out in a stateroom where only employees of the shipyard were present. The admitted circumstances are such as to place upon the shipyard the burden of proving absence of negligence on its part or the part of its employees. No attempt was made to assume this burden, and on this theory the United States is undoubtedly entitled to recover. A prima facie case of negligence was undoubtedly made out."

The Court further held that even though negligence had not been proven by the shipowner, the shipyard's failure to comply with the contract respecting fire protection had been shown and would have rendered it liable. The shipyard on either theory would have been responsible for the loss. This was also a case where specific acts of negligence were set forth in the libel, yet the Court held that the relationship was one of bailment and the shipyard had the burden of proving the absence of negligence.

In the case of *Cary-Davis Tug & Barge Co. vs. Fox*, 1927 (C.C.A. 9th) 22 Fed. (2d) 64, which also

came up on appeal from the District Court of the United States for the Northern Division of the Western District of Washington, a repairman was working on a tugboat which was in use by the owner during a portion of the time, and the court below found that the cause of fire was "from some condition or substance or material from a creation or contact while the tug was in the exclusive control of the owner, and that no agency of the contractors in any way contributed to the fire." The appellate court declined to overrule the finding of fact of the court below, although it recognized the usual rule applicable to bailees having exclusive possession.

The Circuit Court of Appeals for the Fourth Circuit, in the case of *Thompson vs. Chance Marine Const. Co.*, 1930 45 Fed. (2d) 584, recognizes the same rule laid down in the foregoing decisions. This was a libel brought to recover damages for the loss by fire of a small gas boat while undergoing repairs. The lower court found that the construction company had proven the absence of any negligence on its part or the part of its employees in causing the fire, and dismissed the libel. The appellate court refused to disturb the find-

ing of the lower court and affirmed the judgment.

A. Cases cited by Appellant may be readily distinguished.

In *The Kennebec*, (C.C.A. 4) 258 Fed. 222, the ship owner sued the dry dock company for failure to furnish steam to a vessel as a result of which certain water pipes froze and bursted. The following language clearly distinguishes this case.

> "It thus appears that whatever request for heat may have been made the dock company at once refused, and the captain without protest took measures accordingly. If, therefore, the dock company was under any obligation it was an obligation, not of contract, but imposed by law because of the relationship of the parties."

The Court further held that the work of the appelee was confined to the exterior of the hull and had nothing to do with any other part of the vessel.

> "The captain continued in command, and he and the crew stayed on board. In every substantial sense the ship remained in the control of her master, and the dock company certainly did nothing to interfere with that control, or to prevent him from doing whatever he thought necessary to protect the machinery of the vessel."

In *Boe vs. Hodgson Graham Co.*, 1918, 103 Wash. 669, 175 Pac. 310, the bailor's brother-in-law, the former navigator of the vessel, by agreement, was aboard the ship during her use by bailee, and on conflicting testimony the Court found that he was in charge of her operations, and that the fault, if any, was his.

The true rule of bailment as applicable to the case at bar, is expressed in the shipyard cases referred to above and is recognized by the Supreme Court of Washington in the case of *Burley vs. Hurley-Mason*, 1920, 111 Wash. 415, 191 Pac. 630. Here one using a scow received in good condition, and returned in bad condition, was held liable on the ground that the presumption arising from the fact of injury was not overcome by the evidence. The Court in expressing the correct rule said:

> "Before taking up the consideration of the questions of fact, two rules of law should be stated, the first of which is that the appellant did not become liable as an insurer for any damage that the scow might sustain while in its possession but only for the failure to exercise ordinary care * * *. The other rule is that, in cases where property is delivered to the bailee in good condition and returned damaged, a presumption arises of negligence on the part of the bailee and casts upon him the

burden of showing the exercise of ordinary care."

The case of *McDonald vs. Perkins*, 1925, 133 Wash. 622, 234 Pac. 456, 40 A.L.R. 859, cited by appellant, recognizes the usual rule.

Appellant cites the cases of *Ex Parte Mobile Light & R. R. Co.*, 1924, 211 Ala. 525, 101 So. 177, 34 A. L. R. 921, *Broaddus vs. Commercial National Bank*, 1925, 113 Okla. 10, 237 Pac. 583, 42 A.L.R. 1331, and *Kee vs. Bethurum*, 1930, 146 Okla. 237, 293 Pac. 1084, in support of its contention that in the instant case there was no relationship of bailor and bailee. The first case involves the relationship existing between an automobile owner and the operator of a parking lot, while the two last cases cited present that relationship existing between landlord and tenant. But in the present case, the vessel "Guard" had been delivered to the appellant's shipyard for repairs, and the relationship existing has been classed by the foregoing shipyard cases as a "*locatio operis faciendi*" bailment, thus there is no analogy between the cited cases and this case.

Colburn vs. Washington State Art Ass'n., 1914, 80 Wash. 662, 141 Pac. 1153, L.R.A. 1915 A, 594,

Burke vs. Bremerton, 1925, 137 Wash. 119, 241 Pac. 678, and *Southern R. R. vs. Prescott*, 1916, 240 U. S. 632, 60 L. Ed. 836, 36 Sup. Ct. Rep. 469, are cited in support of the rule that where the bailee has fixed the cause of the damage which is not ordinarily or necessarily attributable to his negligence, that the burden of going on with the evidence then shifts to the bailor to prove actual negligence. This, however, is not the rule in shipyard cases as may be seen from the decision in *Newport News vs. U. S.*, 34 Fed. (2d) 100, *supra*, which distinguishes *Southern R. R. Co. vs. Prescott*, in the following language:

> "The cases cited in respondent's note—like *Southern Railway Co. vs. Prescott*, 240 U. S. 632, 36 S. Ct. 469, 60 L. Ed. 836—are not, in my opinion, in point, for in all such cases the bailee was a mere custodian, whereas in the cases from which I have quoted, as in this case, the bailment was that known as *locatio operis faciendi.**** (Italics ours)

Appellant urges that having pleaded specific acts of negligence, appellee cannot rely upon presumptions. In the first two cases cited on pages 24 and 25 of appellant's brief, the Court again refers to the line of cases distinguished in the *Newport News* case where the bailee is merely a custodian.

In the *Delaware* case and the *Glacier Fish* case cited on the same two pages, the court likewise emphasizes the fact that if a plaintiff relies upon negligence he must prove it, which is obvious. As has been previously noted in the shipyard cases, although specific negligence was alleged, the presumption was nevertheless indulged in.

It is submitted that from the evidence in this case and the decisions cited, the lower court committed no error in finding that the relationship between appellant and appellee was one of bailment. The appellee having delivered the vessel "Guard" to appellant's plant for repairs, the bailment created was one classified as *locatio operis faciendi.* Although two members of the crew of the "Guard" were on board the vessel at the time of the fire, no contention has been made that it had its origin in a place under the control of the appellee or its employees. It is undisputed that the fire which caused the damage originated in the boiler room of appellant's plant, spread to its joiner plant, and then to the vessel "Guard." Under these circumstances, upon a showing of the appellee of the return of the vessel "Guard" in a damaged condition, the onus was

upon the appellant to prove the damage was not occasioned by its negligence. Appellant failed to meet the prima facie case so established.

II. APPELLANT FAILED TO FURNISH THE "GUARD" AMPLE FIRE PROTECTION IN ACCORDANCE WITH THE CONTRACT, AND WAS GUILTY OF NEGLIGENCE.

On page 27 of its brief, appellant comments that it is not suggested that appellant did anything which caused the fire to spread. That is not the point here involved. The contract between the parties specifically provided:

> "GENERAL CONDITIONS * * * Fire Protection—It is clearly understood that the contractor agrees to furnish the vessel with ample fire protection during the time in dry dock or on the marine way."

The vessel was in dry dock. That ample fire protection was not furnished is clearly evidenced by the fact that the vessel was damaged by fire.

On page 28 appellant comments that the only man on duty was the night watchman, Clark. The plant

was a sizeable one and ample fire protection would certainly include the employment of more than one watchman, especially when ships were in appellant's dry dock. The testimony clearly shows that this watchman's duties were such that he could render no assistance whatsoever to the vessel in question, nor is there any proof that he or anyone else pointed out to the two members of the crew aboard the "Guard" the location of any of the much emphasized fire apparatus. The only piece of fire apparatus used was that used by the two volunteer members of the ship's crew and consisted of a small hose primarily kept to hose down the hulls of ships as they were withdrawn from the water. There was no protection other than this piece of apparatus which eloquently proved its inadequacy.

The lower court found that the plant was equipped with fire apparatus sufficient for its own protection, but there was no fire protection afforded for the protection of the vessel on the dry dock, either by water supply or chemical apparatus. (Tr. 17, 18) Appellant urges that as the hose used by the two employees of the "Guard" was approximately the same size as their own hose aboard the ship that this was all that

was required by the contract. The fallacy of this is quite obvious. Where a vessel is in the water with engines capable of use, she can readily withdraw from a burning dock or other structure, and her fire apparatus is merely designed to protect her from fires within. However, when the ship is out of water, entirely helpless, not only has the vessel need of protection from some fire aboard ship, but from the added hazard of ships in the near vicinity and a dry dock where the work is of such a character as to be a constant fire menace. It was under these circumstances that the contract required "ample fire protection" while the "Guard" was helpless, and it is obvious that ample fire protection consisted of something more than a one inch hose hanging over the rail of the ship with no one to operate it.

Counsel for appellant call attention to the fire buckets, fire hose and sand boxes, scoops and portable fire extinguishers required by regulations to be kept aboard a Coast Guard vessel. By the time the fire had reached the "Guard" these would be, of course, utterly useless, as they are merely emergency devices and the fire hose aboard ship was never capable of use as the

ship had no power. The one inch hose extending from appellant's wharf to the "Guard", as indicated by the testimony of Mr. Snydow (page 35 of the brief, Tr. 40), was merely a precaution to take care of a fire arising on the vessel, and for that purpose it might be sufficient in view of the limited area. Under no conceivable theory could it be considered adequate to protect against a dock fire.

It is urged that the two men aboard the "Guard," who were in fact volunteers as far as this work was concerned, did not do all that they should have done. This is answered by a specific finding of the lower court in the following language:

> "The seamen acted with all diligence and as reasonably prudent persons would under the circumstances, in the protection of their vessel." (Tr. 17, 18)

Counsel, on page 36 of his brief, appears to consider there was an obligation upon the ship's crew to have used the fire extinguishers. "Ample fire protection" includes not only the equipment, but likewise the men to use the same.

Counsel urges the tardy arrival of the City Fire

Department. This has no bearing where a positive contract to protect the vessel is concerned.

Counsel's repeated description of the various fire apparatus is of no moment, as none of it was used, nor was any of it capable of being used as there was no one present to use it.

On page 31 of its brief, appellant says:

> "We submit, therefore, that there is absolutely no evidence of negligence on the part of the watchman, the only employee of the appellant who was in the plant."

The evidence discloses that at the time of the fire, the watchman was in the dockmaster's office, which was approximately 125 feet from appellant's boiler room, reading a newspaper, and that he had been there for a period of 45 minutes after making the last round of appellant's plant. Tr. 61, 67) This employee of appellant knew nothing of the fire until it had gained some headway, and then he was informed of its existence by an outsider. (Tr. 61, 67) According to his own testimony, he opened the gates of appellant's yard so that the fire department might enter and then made some unsuccessful attempt to use a two inch canvas

covered fire hose, but he made no effort whatever to aid the two men on the "Guard," nor did he go near that vessel. (Tr. 61-65) The outsider who had notified the watchman of the existence of the fire, telephoned the fire department and aroused the two men stationed on the "Guard." (Tr. 67)

Assuming, however, that appellant's statement that there was no negligence on the part of its watchman is correct, the negligence goes directly back to the owner in the following respects among others:

1. The number of watchmen was ridiculously inadequate.
2. The fire apparatus was incapable of being used as there was no crew to use it.
3. Location and method of use of this fire apparatus was never pointed out or explained to the ship's crew if they were to be relied on for its use.
4. If the watchman was not negligent as appellant urges, then the dockmaster's office, where he was stationed for forty-five minutes of each hour between hourly rounds of appellant's plant, was too far away to be of any practical use for one performing his duties.

We contend, therefore, that appellant failed to furnish the vessel "Guard" ample fire protection while

in dry dock in accordance with the terms of the contract, and that the appellant or its employees were guilty of negligency in permitting the fire to spread to the "Guard."

III. THERE WAS NO FAILURE OF THE CREW TO PROTECT THEIR VESSEL.

It is urged by appellant that the Coast Guard regulations placed the crew of the "Guard" under the duty of expending greater effort in the protection of their vessel. These regulations obviously refer to the duties of the crew while the vessel is in commission. Here the vessel was wholly out of commission, in the hands of a dry dock company which had agreed to furnish "ample fire protection." They were awakened and, as found by the court, did all they could to save the vessel, and did succeed in preventing any very serious loss.

At the trial, and at the conclusion of the government's case, the appellant moved for a dismissal, basing a portion of its motion on the alleged failure of the crew in exercising due care in the protection of their vessel. (Tr. 51) The lower court, who had the opportunity of seeing the witnesses, hearing their testimony

and judging their credibility, in overruling the motion, commented on the course of conduct of the two members of the crew of the "Guard" as follows:

> "Upon that phase of the question, I must say: I do not think your position is well taken. I think, so far as a reasonable conduct on the part of these seamen, they showed about as contiguous conduct as could possibly be conceived. They seemed to act in a rightful sort of way, just what reasonable men would be presumed to do. The first thing they did was to fix this hose and they tried to put the fire out, and when they saw they could not do that,—there was material on the dock, and if there was any wind it was away from the "Guard", and they could reasonably conceive the idea that this was the thing that was in danger, and that was the first thing they did. I think they did exactly the same thing that an ordinarily intelligent person would do, and they came back and got the row boat. I think, as far as these seamen are concerned, they exercised more consecutively reasonable steps than is usually developed, and I think they showed a splendid presence of mind. * * * (Tr. 51, 52)

Certainly, it comes with ill grace from the appellant now to criticize the extent of their activities and the efforts which they voluntarily contributed when they found the shipyard had entirely fallen down on its agreement.

The criticisms in the brief are obviously without merit, first, because the actions of the crew represented their best judgment under emergency conditions when the courts are notoriously lenient in excusing an act done in extremis; and, second, it is pure hypothesis to conjecture what would and what would not have been the wisest program under the circumstances. The good faith of the two men is certainly not questioned. Third, the sole employee of the dry dock company issued no orders and offered no suggestions. After all, it was primarily the dry dock company which should have taken the initiative.

In view of the foregoing, it is urged that the crew of the "Guard" acted as reasonable and prudent men under the circumstances in the protection of their vessel.

CONCLUSION

All of the assignments of error interposed by appellant are predicated upon certain findings of fact made and entered by the lower court and that court's

refusal to enter various findings proposed by appellant. The determination of this appeal depends almost entirely on whether the evidence in the case supports the court's findings. The rule is well established that an appellate court will not disturb findings of fact based on conflicting testimony unless clearly shown to be against the weight of the evidence. In the case of *Thompson vs. Chance Marine Const. Co.*, 45 Fed. (2d) 584, supra, the Court, in sustaining the lower court's findings, said:

> "This court has repeatedly held that a finding of the trial judge, who had the opportunity of seeing the witnesses, hearing their story, judging their appearance, manner, and credibility, on questions of fact, is entitled to great weight, and will not be set aside, unless clearly wrong. *Lewis v. Jones* (C.C.A.) 27 Fed. (2d) 72; *The Hugoton; Malstron Co. v. Atlantic Transport Co.*, (C.C.A.) 37 Fed. (2d) 570. We know of no federal decision to the contrary opinion on this point. Here the judge was in our opinion clearly right in the conclusion reached by him upon the testimony."

Again the Circuit Court of Appeals for the Ninth Circuit in the case of *Cary-Davis Tug & Barge Co. vs. Fox*, 22 Fed. (2d) 64, supra, a shipyard case in which the lower court's findings of fact were upheld, stated:

> "The question involved is largely one of fact. The case was heard on testimony taken in open court, and is therefore controlled by the familiar rule that findings of fact based on conflicting testimony will not be disturbed, unless clearly shown to be against the weight of the evidence. * * * There may be other circumstances in the case, but the foregoing is in substance the material testimony upon which the findings of the court below were based, and from a careful review of the testimony we are unable to say that the findings are contrary to the great weight of the evidence, or indeed that they are against the weight of the evidence at all."

An examination of the evidence in this case as contained in the Bill of Exceptions (Tr. 32 to 74) will disclose that the court's findings of fact that

1. A bailment existed between the parties;
2. Appellant was negligent in protecting the "Guard" after the fire was discovered;
3. Appellant failed to furnish the "Guard" with ample fire protection called for by the contract; and
4. The crew of the "Guard" did not breach their duty in protecting their vessel,

were overwhelmingly supported by the testimony.

We, therefore, respectfully submit that the Court committed no error, and that the judgment of the United States District Court for the Western District of Washington, Northern Division, should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

JOHN AMBLER,
Assistant United States Attorney

OWEN P. HUGHES,
Assistant United States Attorney.

No. 7569

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

LAKE UNION DRY DOCK & MACHINE WORKS,
a corporation,

Appellant.

VS.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM A JUDGMENT
OF THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.
HON. JEREMIAH NETERER, *Judge.*

PETITION FOR REHEARING

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FRAYN PRINTING COMPANY

No. 7569

UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

LAKE UNION DRY DOCK & MACHINE WORKS, a corporation,

Appellant

vs.

UNITED STATES OF AMERICA,

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ON APPEAL FROM A JUDGMENT
OF THE
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UNITED STATES CIRCUIT COURT OF APPEALS

Ninth Circuit

LAKE UNION DRY DOCK & MACHINE WORKS, a corporation, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 7569

PETITION FOR REHEARING

Comes now the appellant, Lake Union Dry Dock & Machine Works, a corporation, and respectfully petitions this Court for a rehearing in the above-entitled matter upon the ground that substantial errors have been made in the decision heretofore entered by this Honorable Court on the fourth day of November, 1935, to the manifest prejudice of appellant herein, said errors being as follows:

NO BURDEN ON APPELLANT TO SHOW DUE CARE

The substance of this Court's decision is that "the burden of showing due care rested upon the bailee" and that the appellant did not sustain this burden. We submit that in so holding this Court overlooked the principle that the law of the State wherein the contract to repair was made and performed should govern, and further that this Court erred in following a rule applicable only to that class of bailments known as "*locatio operis faciendi.*"

The record indicates that at the time of the fire the "Guard" was in appellant's yard in Seattle under a contract to repair, the latter having been executed in the same city. Consequently any controversy between the parties is governed by the law of the State of Washington.

Security Mortgage Co. v. Powers, 278 U. S. 149, 49 Sup. Ct. Rep. 84, 73 L. Ed. 236;

Mutual Life Insurance Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. Rep. 106, 45 L. Ed. 181;

Coghlan v. S. Carolina R. Co., 142 U. S. 101, 12 Sup. Ct. Rep. 150, 35 L. Ed. 951;

Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed. 245;

Conner v. Elliott, 18 How. 591, 15 L. Ed. 497.

In support of its statement of the rule of law applied to this case, this Court cites several Federal cases (none of which involve the law of the State of Washington) and one decision of the Supreme Court of this State, namely, *McDonald v. Perkins,* 133 Wash. 622, 234 Pac. 456. The latter, however, clearly indicates that the

principle adopted by this Court is not the law of the State of Washington. On page 635, (Pacific Reporter, p. 461) the rule followed in this jurisdiction is stated as follows:

> " 'The ordinary rule established by numerous authorities is, that when the plaintiff has proved the deposit of his goods, and a failure of the defendant to produce the same on demand, he has established a *prima facie* case, and the defendant must excuse his failure to produce, by bringing himself within one of the recognized exceptions.' *Lockwood v. Manhattan Storage & Warehouse Co.*, 28 App. Div. 68, 50 N. Y. Supp. 954. The recognized exceptions are *loss of the goods by fire,* loss by theft, loss by leakage, or loss by the act of God." (Italics ours.)

The most recent Washington case on this point is *Birk v. City of Bremerton,* 137 Wash. 119, 241 Pac. 678, wherein it is said:

> "The law, with reference to the liability of warehousemen is well settled. A warehouseman is bound to exercise ordinary diligence only. *Colburn v. Wash. State Art Ass'n,* 80 Wash. 662, 141 Pac. 1153, L.R.A. 1915-A 594. When, however, it is shown that the loss is occasioned by larceny, burglary, *fire,* or other cause which of themselves do not point to negligence on the part of the bailee, the bailee has then met the *prima facie* case made against him by his failure to return the goods, and *the burden of proof as to negligence then rests upon*

the plaintiff as in any other case of alleged negligence." (Italics ours.)

Also see:

Colburn v. Wash. State Art Ass'n, 80 Wash. 662, 141 Pac. 1153, L.R.A. 1915-A 594;

Firestone Tire & Rubber Co. v. Pacific Trans. Co., 120 Wash. 665, 208 Pac. 55, 26 A.L.R. 217;

Harland v. Pe Ell State Bank, 122 Wash. 289, 210 Pac. 681.

There is nothing in any of these cases to indicate that the rule should only be applied "in the absence of circumstances permitting the inference of lack of reasonable precautions." In this jurisdiction the law is not thus qualified.

Moreover, the principle established by the Federal cases cited by this Court is inapplicable to the case at bar. Each of these decisions involved damages to a vessel *resulting from work done upon the boat itself.* The first case referred to concerned a loss occasioned by a faulty telegraph system just repaired by the defendant. The remaining three involved fire losses and in each instance the fire was shown to have originated *aboard ship at points where the respective defendants had been doing work.* As is pointed out in these cases, the bailments involved were those classed as *locatio operis faciendi*—there being work and labor to be performed on the thing delivered—and the Courts have held that under such circumstances the duty of explaining damage arising out of the performance of work is upon the party doing it.

The case at bar, however, does not present this situation. The fire did not originate on the vessel, but started in a boiler room on the wharf some distance away. The "Guard" would have been damaged even if she had been merely moored or stored in the yard; the repairs being made on her had nothing whatsoever to do with the loss. Consequently the case should be determined under the rules of law applicable to the ordinary warehouseman and the principles governing bailments *locatio operis faciendi* are inapplicable.

This distinction is pointed out by the Circuit Court of Appeals for the Fourth Circuit, in *Newport News Shipbuilding & Drydock Co. v. United States of America,* 34 Fed. (2d) 100 (the faulty telegraph system case) where it is said:

> "The cases cited in respondent's note — like *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 36 Sup. Ct. Rep. 469, 60 L. Ed. 836—are not, in my opinion, in point, for in all such cases the bailee was a mere custodian, whereas in the cases from which I have quoted, as in this case, the bailment was that known as *locatio operis faciendi.*"

We submit, therefore, that both the District Court and this Court erred in holding that the appellant was under the duty of showing the exercise of due care. We contend that when we established that the loss was due to fire, the burden of proving negligence rested upon the appellee.

APPELLEE FAILED IN DUTY TO MITIGATE DAMAGES

We respectfully point out that in affirming the lower Court, this Tribunal overlooked the rule of law re-

quiring a party to make a reasonable effort to mitigate or limit his damages. It is well settled that there can be no recovery for losses which might have been prevented by reasonable efforts on the part of the person injured.

Chesapeake & O. R. Co. v. Kelly, 244 U. S. 31, 37 S. Ct. Rep. 487, 61 L. Ed. 970;

United States v. United States Fidelity & Guaranty Co., 236 U. S. 512, 35 S. Ct. Rep. 298, 59 L. Ed. 696;

Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117;

The Baltimore, 8 Wall. 377, 19 L. Ed. 463;

United States v. Smith, 94 U. S. 214, 24 L. Ed. 115.

This Court points out in its decision that the dock supporting the "Guard" could easily have been cast loose from the wharf, and that the wind would have carried it out of the reach of the flames. It appears, however, that the two men stationed on the "Guard" did not resort to this obvious and simple method of protecting their boat, but rather that they devoted fifteen or twenty minutes to a fruitless attempt to extinguish the fire on the wharf and in saving their dinghy.

Their effort to fight the blaze was obviously a waste of time, in view of the fact that when they arrived on the scene it filled the interior of the boiler room, and had broken through the sides and roof. At that time flames were jumping twenty feet into the air. (Tr. p.

42.) Even when they saw the futility of this work and realized the danger to the "Guard" (Tr. p. 44) they decided to first attempt to save the dinghy. The latter was in the yard under the same circumstances as was the larger vessel, and the duties of the appellant as to protection were the same in each instance. Notwithstanding this, however, valuable time was wasted in saving the dinghy, while the "Guard," a large and expensive boat, was left exposed and in close proximity to the fire.

The crew of the "Guard" was under a legal duty to make a reasonable effort to minimize appellee's loss, yet they deliberately delayed in casting the dock adrift until they had saved the dinghy, a small rowboat of comparatively little value. In the meantime the "Guard," worth probably a thousand times as much as the latter, was damaged to the extent of $3362.00. Certainly the crew did not act as reasonable men would have acted under the same or similar circumstances.

We contend, therefore, that it is evident that appellee's loss could have been entirely prevented had its men performed their legal duty, and that consequently appellant cannot be held responsible for the damage resulting from a breach of that duty.

Wherefore, it is respectfully submitted that the decision of the lower Court should have been reversed, and appellant respectfully prays that this petition for a rehearing herein be granted, that the decision of this Court entered on the 4th day of November, 1935, be

set aside, and that a mandate be returned to the lower Court directing the reversal of the decree of said lower Court.

Respectfully,

RAYMOND G. WRIGHT,
H. B. JONES,
ROBERT E. BRONSON,
STORY BIRDSEYE,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the attorneys for the appellant in the above entitled proceeding; that I have prepared on behalf of appellant this petition for rehearing; that in my judgment said petition is well founded, and that it is not interposed for the purpose of delay in any respect.

STORY BIRDSEYE.

No. 7604

United States
Circuit Court of Appeals
For the Ninth Circuit

WISE MANUFACTURING COMPANY
(a corporation),
Appellant,

vs.

E. W. OLIN, RALPH SITES and
BERKELEY PATTERN WORKS,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

No. 7604

United States
Circuit Court of Appeals
For the Ninth Circuit

WISE MANUFACTURING COMPANY
(a corporation),

Appellant,

vs.

E. W. OLIN, RALPH SITES and
BERKELEY PATTERN WORKS,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, for the Northern District of California, Second Division Thereof.

No. 23,049-S

In the Matter of
WISE MANUFACTURING COMPANY (a corporation),
Respondent.

INVOLUNTARY PETITION IN BANKRUPTCY.

The petition of E. W. Olin, Ralph Sites and Berkeley Pattern Works, respectfully show:

I.

That your petitioners are resident of the Southern Division of the United States District Court, for the Northern District of California.

II.

That the Wise Manufacturing Company, a corporation, respondent herein, at all times herein mentioned was, and now is a corporation, duly organized under the laws of the State of California, authorized to do business within the State of California, with its principal place of business in the City of Berkeley, County of Alameda, State of California, and its business is that of manufacturing, selling and distributing tools, dies, equipment and patented articles.

III.

That said respondent owes debts in excess of the amount of $10,000.00 and is now insolvent; that said respondent is not a wage earner, nor a person engaged in farming or the tillage of the soil, and is not a municipal railroad, or an insurance, or banking corporation.

IV.

That your petitioners are creditors of said respondent, having provable claims, amounting in the aggregate in excess of [1]* any security held by them, to the sum of $500.00 and over; that the nature and amounts of your petitioners' claims are as follows:

That your petitioner E. W. Olin has a claim against the said respondent in the sum of $239.34, the same being for the balance due and owing upon a judgment rendered against the said respondent.

That your petitioner Ralph Sites has a claim against said respondent in the total sum of $1029.96 of which $450.00 is for the balance due and owing upon a promissory note made by said respondent in favor of your petitioner Ralph Sites; of which $483.96 is for the balance due and owing upon a judgment rendered against said respondent; and, of which $96.00 is for work and labor done and performed for and at the request of the said respondent.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

That your petitioner the Berkeley Pattern Works has a claim against the said respondent in the sum of $183.50, the same being for work and labor done and for goods sold and delivered for and at the request of the said respondent.

V.

That said respondent is insolvent and within four months next preceding the date of this petition said respondent committed the following acts of bankruptcy:

(a) Said respondent has permitted the sale of certain of its tools and equipment to persons at this time unknown to your petitioners, and has used the proceeds thereof to pay certain of its creditors, the names of whom are at this time unknown to your petitioners, in preference to the rest and remainder of respondent's creditors, including your petitioners herein;

(b) That said respondent has abandoned its business and permitted its assets to be dissipated and squandered to the irreparable damage and injury of its creditors.

VI.

That said respondent is not now engaged in business, and has [2] failed and refused to pay any of its creditors and your petitioners are informed and believe and therefore allege, that said respondent has by means of chattel mortgages, fictitiously permitted, condoned and caused to be sold and fore-

closed all of its real and personal property, leaving the respondent void of any assets with which to pay its creditors to the irreparable injury and damage of said creditors, including your petitioners herein.

WHEREFORE, your petitioners pray that service of this petition, with a subpoena, may be made upon the Wise Manufacturing Company, a corporation, as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged by the Court to be a bankrupt within the prevue of said Acts.

E. W. OLIN,
R. SITES,
BERKELEY PATTERN WKS.,
R. Vosbrink,
Petitioners.

F. B. CERINI,
Attorney for Petitioners.

UNITED STATES OF AMERICA,
District of California,
City and County of San Francisco.—ss.

E. W. OLIN, RALPH SITES and R. VOSBRINK, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

E. W. OLIN,
R. SITES,
BERKELEY PATTERN WKS.,
R. Vosbrink.

Subscribed and sworn to before me this 28 day of March, 1933.

[SEAL] ANTONIO M. COGLIANDRO,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Dec. 31, 1934.

[Endorsed]: Filed Mar. 30, 1933, 9:50 A. M. Walter B. Maling, Clerk. [3]

[Title of Court and Cause.]

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS AND GRANTING PETITIONER'S LEAVE TO FILE AN AMENDED INVOLUNTARY PETITION IN BANKRUPTCY.

Pursuant to the stipulation entered into by and between the parties hereto, on file herein, it is hereby ordered by the Court that the Motion to Dismiss of the Respondent, Wise Manufacturing Company, on file herein, be granted;

IT IS FURTHER ORDERED by the Court that the petitioners, E. W. Olin, R. Sites, and Berkeley Pattern Works be and they are hereby granted until the 8th day of June within which to file an Amended Involuntary Petition in Bankruptcy.

Dated, San Francisco, California.
May 31, 1933.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed May 31, 1933, 11:49 A. M. Walter B. Maling, Clerk. [4]

In the Southern Division of the United States District Court, for the Northern District of California.

No. 23,049-S

In the Matter of
WISE MANUFACTURING COMPANY (a corporation),
Respondent.

AMENDED INVOLUNTARY PETITION IN BANKRUPTCY.

The petition of E. W. Olin, Ralph Sites and Berkeley Pattern Works respectfully shows:

I.

That your petitioners are residents of the Southern Division of the United States District Court, for the Northern District of California.

II.

That the Wise Manufacturing Company, a corporation, respondent herein, at all times herein mentioned was, and now is a corporation duly organized under the laws of the State of California, authorized to do business within the State of California, with its principal place of business in the City of Berkeley, County of Alameda, State of

California, and its business is that of manufacturing, selling and distributing tools, dies, equipment and patented articles.

III.

That said respondent owes debts in excess of the amount of $10,000, and is now insolvent; that said respondent is not a wage earner, nor a person engaged in farming or the tillage of the [5] soil, and is not a municipal railroad, or an insurance, or banking corporation.

IV.

That your petitioners are creditors of said respondent, having provable claims amounting in the aggregate in excess of any security held by them, to the sum of $500 and over; that the nature and amounts of your petitioners' claims are as follows:

That your petitioner E. W. Olin has a claim against the said respondent in the sum of $239.34, the same being for the balance due and owing upon a judgment rendered against the said respondent.

That your petitioner Ralph Sites has a claim against said respondent in the total sum of $1,029.96 of which $450 is for the balance due and owing upon a promissory note made by said respondent in favor of your petitioner Ralph Sites; of which $483.96 is for the balance due and owing upon a judgment rendered against said respondent; and of which $96 is for work and labor done and performed for and at the request of the said respondent.

That your petitioner Berkeley Pattern Works has a claim against the said respondent in the sum of $183.50, the same being for work and labor done and for goods sold and delivered for and at the request of the said respondent.

V.

That said respondent is insolvent, and within four months next preceding the date of this petition said respondent committed the following acts of bankruptcy:

(a) That said respondent has concealed part of its property with intent to hinder, delay and defraud its creditors, to-wit:

That Roy T. Wise, president of respondent corporation, [6] entered into a written contract on or about the 27th day of February, 1930, with Ambrose N. Diehl, of Pittsburg, Pennsylvania, and Will H. Hays, of Sullivan, Indiana. Said contract recited that Roy T. Wise controlled the respondent corporation and would cause said respondent to transfer and assign to the Wise Patent & Development Company, a corporation to be organized under the laws of the State of Delaware by the said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, all its right, title and interest to certain United States patents covering and connected with the Wise Multi-Speed Transmission, in consideration of the sum of $75,000 to be paid to the respondent by the said Will H. Hays, Ambrose N. Diehl and Roy T. Wise. That said United States patents, being the only assets of any considerable value owned by re-

spondent, were transferred and assigned to the Wise Patent & Development Company, a Delaware corporation, by respondent in accordance with the provisions of the above mentioned contract. That no consideration was or ever has been received by the respondent for said United States patents. That the consideration named in said contract is sufficient to satisfy all claims of creditors. That said contract, as a valuable asset of respondent corporation, was and has been secreted and wholly concealed by respondent corporation from the creditors of respondent corporation, with intent to delay, hinder and defraud said creditors. That said contract was never recorded or registered of record by respondent, and that your petitioners were totally unaware of the existence of said contract and had no knowledge thereof until the 30th day of March, 1933, on which day the existence of said contract was first revealed to your petitioners.

(b) That said respondent has concealed part of its property, with intent to hinder, delay and defraud its creditors, [7] to-wit:

That the said respondent through its president Roy T. Wise, during the months of June, July and August, 1931, caused to be sold and did sell certain tools, machinery and equipment belonging to said respondent to persons unknown to your petitioners. That respondent received the approximate sum of six hundred and five dollars ($605) from said sales. That said respondent, through its president Roy T. Wise, with intent to hinder, delay and defraud its creditors, caused the said approximate

sum of six hundred and five dollars ($605) to be deposited in the West Berkeley Branch of the Bank of America, Berkeley, California, in the name of H. Jacobson. That the above mentioned sum of six hundred and five dollars ($605) is the property of respondent, and was and has been concealed and secreted by the said Roy T. Wise from the creditors of the respondent. That your petitioners were totally unaware of the said sale and fraudulent concealment of these assets, and had no knowledge thereof until the 27th day of April, 1933, on which date the above mentioned transaction was first revealed to your petitioners.

VI.

That said respondent is not now engaged in business, and has failed and refused to pay any of its creditors.

WHEREFORE, your petitioners pray that the respondent Wise Manufacturing Company may be adjudged by the Court to be a bankrupt within the prevue of the Acts of Congress relating to bankruptcy.

E. W. OLIN,
BERKELEY PATTERN WORKS,
By.....,
Petitioners.

FLOYD B. CERINI,
Attorney for Petitioners. [8]

STATE OF CALIFORNIA,
City and County of San Francisco.—ss.

FLOYD B. CERINI, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice before all Courts of the State of California and the United States District Court for the Northern District of California, and has his office at No. 550 Montgomery Street, in the City and County of San Francisco, State of California, and is attorney for the petitioners in the above entitled action. That said petitioners are not residents of the City and County of San Francisco and are not within said city and county, and for that reason affiant makes this verification for and on behalf of said petitioners, and by their authority. That affiant has obtained personal knowledge of the facts set forth in said amended petition from documents and interviews with said petitioners. That he has read the foregoing amended petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

FLOYD B. CERINI.

Subscribed and sworn to before me this 7th day of June, 1933.

[Seal] ANTONINO M. COGLIANDRO,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 7, 1933, 11:58 A. M. Walter B. Maling, Clerk. [9]

[Title of Court and Cause.]

ANSWER.

Comes now the respondent, the Wise Manufacturing Company, and answers the amended involuntary petition in bankruptcy herein, as follows:

(1)

Referring to the creditors' claims mentioned in paragraph IV of said petition, the respondent corporation alleges:

Said claims arose after the making of the contract mentioned in paragraph V(a) of the petition and after the sales referred to in paragraph V(b) of the petition, and after the deposit referred to in paragraph V(b) of the petition.

(2)

Respondent denies that it has concealed part of its property with intent to hinder, delay or defraud its creditors and respondent particularly denies the acts of concealment detailed in paragraph V of the said petition. [10]

(2a)

Respondent admits that on February 27, 1930, Roy T. Wise, the president of the respondent corporation, executed the written contract mentioned in paragraph V(a) of the petition, and that said contract recited that said Roy T. Wise controlled the respondent corporation and would cause said respondent corporation to transfer and assign to

the Wise Patent and Development Company, a corporation, to be organized under the laws of the State of Delaware, by Will H. Hays, Ambrose N. Diehl and Roy T. Wise, all its right, title and interest to certain United States patents and patent rights, covering and connected with the Wise Multi-Speed Transmission, but the respondent denies that the consideration agreed to be paid for the transfer referred to was the sum of $75,000.00, or that it was agreed that said Hays, Diehl and Wise, or any of them, was to make said payment. On the contrary, it was specifically agreed in said written contract that the $75,000.00 referred to in said amended petition was to be paid by the new corporation to be formed, to-wit, the Wise Patent and Development Company, and in accordance with paragraph (7) of said written contract, and not otherwise. That said paragraph (7) of said written contract read as follows:

"7. It is further agreed by the parties hereto after such patents and rights are vested in said company, all as herein provided for, that such company shall further endeavor to develop by license, sale or otherwise the said device known as the Wise Multi-Speed Transmission, with all improvements thereon, and shall further proceed so to develop, market and license any other patents of merit which may be accepted by it to the best of its ability and from the proceeds received by the said company for such activity cash payments up to the sum of Seventy-five Thousand Dollars ($75,000.00) shall be made to the Wise Manufacturing Company from

surplus accumulating over the expense of operating such proposed Wise Patent and Development Company at such times as funds are available; such payment of such sums up to said Seventy-five Thousand Dollars ($75,000.00) to be by way of reimbursement to the party of the first part and the California companies above mentioned which he controls for expenditures to date in connection with the development of the patents, together with substantial [11] addition. It is understood that neither the physical properties nor any of the capital stock of the Wise Manufacturing Company are to be transferred at this time to the Wise Patent and Development Company as any part of this transaction;''

That when said agreement of February 27, 1930, was made the Standard Die and Tool Company, Incorporated, a California corporation, owned most of the stock in said Wise Manufacturing Company, respondent herein, and said agreement of February 27, 1930, further recited that by stock ownership or otherwise the Standard Die and Tool Company, Incorporated, a corporation, was interested in the patents and patent rights therein referred to.

That said Standard Die and Tool Company, Incorporated, after the forming of the Wise Manufacturing Company, had transferred a large portion of its assets to said Wise Manufacturing Company in consideration of the issuance of most of the outstanding stock of said Wise Manufacturing Company, and in consideration of an agreement by said Wise Manufacturing Company to pay the debts of

said Standard Die and Tool Company, Incorporated. That the intention was to have the first company be interested in the marketing of the products of the second company, and that the second company should be the manufacturing concern. That on February 27, 1930, said two companies were considerably indebted, and it had become important to the stockholders and creditors of said companies that the said Roy T. Wise should make an effort to cause said Hays and said Diehl or someone else similarly situated to become interested in the plan to manufacture, use and market the articles covered by said patents and patent rights. That the aforesaid necessities contributed in causing the making of the agreement of February 27, 1930. Said Wise was also interested in the patents and patent rights which were the subject of said agreement of February 27, 1930. [12]

That the said older companies, the Wise Manufacturing Company and the Standard Die and Tool Company, Incorporated, are herein referred to as the California corporations.

Said agreement of February 27, 1930, also provided that the title of the newly formed company, the Wise Patent and Development Company, in the said patents and patent rights covered by said agreement was to be made perfect, and that this was to be accomplished through the obtaining of all necessary transfers of said patents and patent rights, and also through the acquiring of all of the stock in said California corporations referred to, and said agreement contemplated that by the funds derived

through said contract and by contracts made with said new company, said California corporations would be put in a position to pay their debts, which were large in amount. That said agreement of February 27, 1930, further contemplated that said California corporations would have the advantage of the efforts and aid of said Hays and Diehl and said new Company in marketing and making use of said patents and patent rights and of the articles covered thereby.

That in the matters connected with the making of and in the transactions connected with the making of said agreement of February 27, 1930, and the agreements modifying said agreement, said Roy T. Wise was representing said California corporations, notwithstanding the separate plan of said agreements that the stock of the stockholders in said California corporations would be acquired if that was possible. That said patents and patent rights were to be transferred to the new company, even though all of the stock of the California corporations was not acquired in connection with the transfer.

That the patents and patent rights referred to and any interest of the said Wise therein were transferred to said [13] new company, pursuant to said agreement of February 27, 1930, and the agreements modifying the same.

That the said agreement of February 27, 1930, provided that the new corporation to be formed should have 1200 shares of capital stock.

That on May 8, 1930, the three parties to said agreement of February 27, 1930, agreed in writing to change said agreement of February 27, 1930.

That said agreement of May 8, 1930, provided that the new corporation should have 2500 shares.

That each agreement provided for the issuance of certain shares to the three parties and for certain uses of the shares remaining after the issuance of the shares to the three parties.

The said agreement of May 8, 1930, particularly provided that as the said Hays and Diehl had made advances to said Wise in connection with the carrying out of the plan involved in the two agreements, and in protecting and perfecting said patents and patent rights for the purpose of making the same usable and marketable, these advances should be repaid before any of the $75,000.00 mentioned in Paragraph (7) of the agreement of February 27, 1930, should be paid. That the advances referred to have not been paid, and in fact nothing has been derived through the operations provided for in Paragraph (7) of said agreement of February 27, 1930. That said agreement of May 8, 1930, also provided that the Wise Patent and Development Company should make certain loans to the said Roy T. Wise, which should be secured, as therein provided, and that such security should include the shares of the stock in the new Company that it was agreed should be issued to said Wise.

That in many other particulars said agreement of [14] May 8, 1930, modified said agreement of February 27, 1930.

That on September 1, 1930, the said two previous agreements were further modified by written agreement executed by the same three parties, and that by said agreement of September 1, 1930, the provisions of Paragraph (7) of said agreement of February 27, 1930, as the same had been modified by the agreement of May 8, 1930, were abrogated, and eliminated from the agreements of the said three parties. That by this time, and particularly through the efforts of said Hays and Diehl, the Westinghouse Electric and Manufacturing Company had entered into a contract with said Wise Patent and Development Company, whereby for certain interests in said patents and patent rights said Westinghouse Electric and Manufacturing Company was to pay certain sums to said Wise Patent and Development Company. That said agreement of September 1, 1930, provided that the said Roy T. Wise was entitled to a certain sum of $10,000.00 paid by the Westinghouse Electric and Manufacturing Company, and would be entitled to a certain additional sum of $25,000.00 which said last named company might pay but that said sums would have to be paid as mere credits on a note for $40,000.00 which had been executed by the said Wise Patent and Development Company to the Westinghouse Electric and Manufacturing Company on August 30, 1930, the said note having been made and having been endorsed by said three parties to raise money to meet the expense of carrying out the plan of said three contracts to perfect the title to and make use of and market said patents and patent rights.

That the said Roy T. Wise was the president of said California companies last referred to, and that he undertook to act for said two companies, and that he at all times acknowledged that any consideration received by him through [15] the transactions represented by said three contracts would be the property of said companies in proportion to their interests in the subject matter of said contracts.

Respondent denies that the making of said contracts or of any of them or the existence of any of said contracts or any of them was concealed, for the purpose of hindering, delaying or defrauding any creditor or creditors of respondent, but the object and purpose thereof was to pay all the debts of said companies and satisfy all demands of stockholders thereof. That in fact the plan of said contracts was almost perfected. That in connection with the making of said contracts and in connection with the transactions represented thereby a large amount of money was loaned and advanced to said California companies by said Wise Patent and Development Company, and that thereby approximately the sum of $20,000.00 was obtained which was used in paying debts of said companies. That said debts were paid through the Bank of America, in Berkeley. That the making of said contracts and the raising of the money to pay said debts was a well-known transaction that was not concealed. That moreover the transaction of buying up the stock in said California corporations was handled through the Bank of America in Berkeley, California. That the stockholders of said companies executed options and left

the same with said bank, and that the only stock that was not finally taken up was the preferred stock of the Standard Die and Tool Company, Incorporated.

That said Wise tried to raise funds by means of said agreements whereby the claims of all of the creditors of said California corporations could be satisfied, but that it turned out that said patents and patent rights were not as valuable as was expected, and difficulties were encountered in marketing said patents and patent rights and articles that might be [16] manufactured and sold pursuant thereto, and that the project of forming said new company, to-wit, the said Delaware corporation, did not prove as successful as was expected. That in fact it is possible that large sums loaned to said California corporations by said Wise Patent and Development Company will never be repaid. That it is not true that the making of said agreements was not an advantage to said Wise Patent and Development Company and its creditors. That to raise the moneys loaned by said Wise Patent and Development Company to said California corporations required the pledging of those assets of said corporations which were not previously subject to deed of trust, and required the pledging of that stock in said Delaware corporation, the new company, which might otherwise have gone to said Wise or said California corporations, or said Wise Manufacturing Company, and that such stock and the right thereto remained subject to the pledge and lien referred to.

Respondent alleges that the petitioning creditors and all creditors of the respondent had notice of and knew for more than a year prior to the filing of the original petition herein of the agreements and transactions herein referred to.

Respondent alleges that it is not true that no consideration was ever received by the Wise Manufacturing Company for the transfer of said patents and patent rights, but the respondent alleges that the interests of said Wise Manufacturing Company in said property became and was represented by the agreements hereinbefore referred to. Respondent alleges that it is uncertain as to what can be realized out of said agreements for the purpose of satisfying the claims of those creditors of the respondent which have not been paid.

(3)

Respondent denies that said contracts or any contract as a valuable asset of the respondent corporation was or has [17] been secreted and/or concealed by respondent from the creditors of respondent corporation with intent to hinder, delay or defraud a creditor or creditors of said corporation.

On the contrary, respondent alleges that the petitioning creditors herein, if they were wanting in any information in regard to the transactions referred to were guilty, and each of them was guilty, of gross neglect and laches in making inquiry of officers and stockholders of said corporations and of each of them. That for over a year prior to the filing of the original petition in bankruptcy herein

the preferred stockholders whose stock was not purchased in connection with said contracts, had broadcasted complaints and charges relative to said three agreements, and the fact that their stock was not purchased under said agreements. These complaints were public property and were at all times known to the petitioning creditors and their attorneys. There was no concealment originally, but had there ever been it would have been immaterial because of what developed. That in truth and in fact, the plant which was operated by said corporations was shut down about two years before the original petition in insolvency was filed herein, and the petitioners and each of them, and all of the other creditors of respondent corporation knew of said fact when it occurred and knew more than a year before the original petition herein was filed, that the real property on which the plant of respondent corporation was located had been foreclosed upon by third persons, and that all of the machinery and equipment of respondent corporation had been foreclosed upon and sold.

That two of the creditors who filed the petition herein were judgment creditors, whose judgments were about two years old when the original petition in insolvency was filed herein, and that they were at all times in a position to have [18] the respondent corporation examined relative to its assets. That petitioners at all times had attorneys who were familiar with what was trying to be done under said three agreements and who were familiar with the extent to which the paying off of creditors occurred

and the extent to which stock was bought up before the original plan of said contracts failed of completion.

That said respondent corporation was never at any time called upon by its creditors to issue statements with respect to what had happened under said three agreements hereinbefore referred to, and that at any time and by the same inquiry by which the petitioners have their present knowledge, they could have ascertained all details connected with said three agreements. Respondent denies that the petitioners were or that either of them was totally unaware of the existence of said contract of February 27, 1930, and had no knowledge thereof until March 30, 1933. On the contrary, respondent corporation alleges that petitioners were, more than a year prior to the filing of the petition herein, aware of the facts hereinbefore alleged, and they were continuously and constantly put upon inquiry as to the said three agreements and the transactions connected therewith, and that there is no reason or excuse why if the said three petitioners were lacking in information as to the agreements or transactions hereinbefore referred to they did not obtain information and knowledge in regard thereto at least over a year prior to the filing of the petition.

(4)

As another further and separate defense to the alleged cause of action set out in Subdivision (a) of Paragraph V of said petition, respondent alleges that said cause of action is, by reason of the facts

herein alleged, barred by gross laches and neglect on the part of the petitioning creditors herein. [19]

(5)

As further and separate defenses to the acts of bankruptcy claimed to have been alleged in Subdivision (a) of Paragraph V of the amended petition, respondent corporation avers:

(a) No act of concealment of property therein referred to was committed within four months prior to the filing of the original petition herein.

(b) No act of concealment of property therein referred to continued to within four months of the filing of the original petition herein.

(c) No act of concealment of property therein referred to was committed within four months prior to the filing of the amended petition herein.

(d) No act of concealment of property therein referred to continued to within four months of the filing of the amended petition herein.

(e) No transfer or assignment of property therein referred to was made within four months prior to the filing of the original petition herein.

(f) No transfer or assignment of property therein referred to was made within four months prior to the filing of the amended petition herein.

(g) Every transfer of property therein referred to was recorded more than four months prior to the filing of the original petition herein.

(h) Every transfer of property therein referred to was recorded more than four months prior to the filing of the amended petition herein.

(i) Notorious, exclusive and continuous possession of whatever is alleged to have been transferred was taken by the [20] transferee more than four months prior to the filing of the original petition herein.

(j) Notorious, exclusive and continuous possession of whatever is alleged to have been transferred was taken by the transferee more than four months prior to the filing of the amended petition herein.

(k) The petitioning creditors had notice of each transfer referred to more than four months prior to the filing of the original petition herein.

(l) The petitioning creditors had notice of each transfer referred to more than four months prior to the filing of the amended petition herein.

(m) Each and every cause of action alleged in the petition is barred by the provisions of Subdivision (b) of Section 21, Chapter 3 of Title 11 of the United States Code.

(6)

Referring to the allegations of Subdivision (b) of Paragraph V of said petition, respondent admits that in June, July and August, 1931, it sold certain tools, machinery and equipment that belonged to respondent. That said sales were made to various persons and that the amount paid therefor was the sum of $605.00. That there was no concealment

about the making of said sales. That as hereinbefore alleged, the plant of the respondent corporation had been sold, and its machinery and equipment, excepting that which was sold for $605.00, had been foreclosed upon, and that the plant had been shut down. That the petitioners herein were persons who had performed services or loaned money to said Roy T. Wise for respondent corporation or who had furnished materials to respondent corporation, all in connection with the active operation of respondent corporation as a manufacturing concern, and that said petitioning creditors and all [21] of the creditors of respondent corporation knew of the closing down of the business of the respondent, of the shutting down of its plant, and that all of its assets had been disposed of in the manner in this answer alleged and that said facts were known to said petitioning creditors in the year 1931. That it is a fact that Roy T. Wise, who was the president of respondent corporation, caused the $605.00 mentioned to be deposited in the name of H. Jacobson. That the purpose of said deposit was to make it possible for the said Roy T. Wise, president of said corporation, to distribute said moneys equally among creditors of said corporation, and so as to prevent any particular creditor from attaching said moneys and obtaining a preference thereby. That the deposit of said moneys in the name of H. Jacobson was not made for the purpose of concealment, nor were such moneys concealed with any intent to hinder, delay or defraud any creditor or creditors. That as is well known by the said petitioners said

moneys were in the year 1931 mostly withdrawn by the said H. Jacobson to pay herself wages which were due to her, and the balance of said moneys was paid out under the direction of said Roy T. Wise on a claim against respondent corporation for legal services, and that all of said acts occurred in the year 1931, and that it is not true in any sense that said deposit is an asset of said corporation. That as is well known to the petitioners the said deposit was wholly used up by said corporation in the year 1931. That in the year 1931 said respondent corporation was being pursued by various of its creditors who had not been paid through the loan hereinbefore mentioned, and it was the hope and expectation of the said Roy T. Wise that said funds could be used in meeting claims of creditors but without preferring a particular creditor. That said deposit was not made with a view to hinder, delay or defraud any creditor or creditors, but said deposit was made [22] for the purpose of avoiding the preferring of any particular creditor of respondent corporation. Respondent denies that said deposit was or has been concealed or secreted by the said Roy T. Wise. Respondent denies that said petitioners were totally unaware or unaware at all of the sale of the tools, machinery and equipment referred to in Subdivision (b) of Paragraph V of the petition, but said petitioners and all the other creditors of the respondent corporation knew that its plant and all of its tools, machinery and equipment had been sold off and disposed of. That the petitioning creditors and said other creditors knew

this before the end of the year 1931, and that it is not true that they had no knowledge thereof until April 27, 1933.

(7)

That there is no reason or excuse for the failure of the petitioning creditors to make inquiry relative to the assets of respondent corporation. That by reason of all of the facts hereinbefore alleged the petitioning creditors are barred by their gross laches and neglect to prosecute the petition herein, and that it would be inequitable and unfair to permit the petitioning creditors to make use of the powers of this Court as a Court of bankruptcy in an effort to collect the demands due to them. That no facts exist which justify this bankruptcy proceeding, and that the petitioners have no right on account of anything alleged in the petition to be put in charge of or in control of the respondent corporation.

(8)

As further and separate defenses to the acts of bankruptcy claimed to have been alleged in Subdivision (a) of Paragraph V of the amended petition, respondent corporation avers: [23]

(a) No act of concealment of property therein referred to was committed within four months prior to the filing of the original petition herein.

(b) No act of concealment of property therein referred to continued to within four months of the filing of the original petition herein.

(c) No act of concealment of property therein referred to was committed within four months prior to the filing of the amended petition herein.

(d) No act of concealment of property therein referred to continued to within four months of the filing of the amended petition herein.

(e) No transfer or assignment of property therein referred to was made within four months prior to the filing of the original petition herein.

(f) No transfer or assignment of property therein referred to was made within four months prior to the filing of the amended petition herein.

(g) Notorious, exclusive and continuous possession of whatever is alleged to have been transferred was taken by the transferee more than four months prior to the filing of the original petition herein.

(h) Notorious, exclusive and continuous possession of whatever is alleged to have been transferred was taken by the transferee more than four months prior to the filing of the amended petition herein.

(i) The petitioning creditors had notice of each transfer referred to more than four months prior to the filing of the original petition herein.

(j) The petitioning creditors had notice of each transfer referred to more than four months prior to the filing [24] of the amended petition herein.

(k) Each and every cause of action alleged in the petition is barred by the provisions of Sub-

division (b) of Section 21, Chapter 3 of Title 11 of the United States Code.

WHEREFORE respondent prays that petitioners take nothing by their petition, and that it have and recover its costs.

Dated, November 10, 1933.

CLARK, NICHOLS & ELTSE,
GEORGE CLARK,
Attorneys for Respondent. [25]

STATE OF CALIFORNIA,
County of Alameda.—ss.

George Clark, being first duly sworn, deposes and says: That he is attorney for Wise Manufacturing Company, the respondent named in the within answer. That he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated upon his information or belief, and as to such matters he believes the same to be true. That affiant is authorized to and does make this affidavit on behalf of respondent corporation, because the presence of the officers of the said corporation who are familiar with the facts cannot be obtained, and particularly Roy T. Wise, who had charge of all of the matters referred to in the answer is absent from the State of California, and the said Roy T. Wise is president of the respondent corporation.

GEORGE CLARK.

Subscribed and sworn to before me this 10th day of November, 1933.

[Seal] VIRGINIA NELSON,
Notary Public, in and for the County of Alameda, State of California.

[Endorsed]: Filed Nov. 13, 1933, 9:10 A. M. Walter B. Maling, Clerk, by C. M. Taylor, Deputy Clerk. [26]

[Title of Court and Cause.]

ORDER OF ADJUDICATION.

At San Francisco, in said District, on the 29 day of May, 1934, before the said Court in Bankruptcy, the petition of E. W. Olin, Ralph Sites and Berkeley Pattern Works that Wise Manufacturing Company, a corporation be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, and it appearing to the Court that service of said petition with a writ of subpoena has been duly served on the alleged bankrupt and that the said alleged bankrupt has filed his answer thereto; and the issues raised have been duly tried and submitted and an order entered on April 6th, 1934, adjudging respondent bankrupt upon findings of fact and conclusions of law;

IT IS HEREBY ORDERED that said Wise Manufacturing Company, a corporation, be and is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to Burton J. Wyman, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Wise Manufacturing Company, a corporation shall attend before said referee on the 8th day of June, 1934 at his office in Oakland, California, at 10 o'clock forenoon, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

It is further ordered that all notices required to be published in the above-entitled matter, and all orders which [27] the Court may direct to be published, be inserted in the "Inter-City Express", a newspaper published in the County of Alameda, State of California, within the territorial district of this Court, and in the county within which said bankrupt reside.

Dated, May 29, 1934.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed May 29, 1934, 9:41 A. M. Walter B. Maling, Clerk. [28]

In the United States District Court for the Northern District of California, Southern Division.

In Bankruptcy.

No. 23,049-S

In the Matter of

WISE MANUFACTURING COMPANY (a corporation),

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause and proceeding came on regularly for trial on the 4th, 5th and 6th days of April, 1934, before the above entitled Court, the Honorable A. F. St. Sure presiding; Messrs. Resleure, Vivell & Pinckney, Eugene R. Elerding, Esq., and F. B. Cerini, Esq., appeared as counsel for petitioning creditors, E. W. Olin, Ralph Sites and Berkeley Pattern Works; Messrs. Clark, Nichols and Eltse, appeared as counsel for respondent; and thereupon evidence both oral and documentary was offered by the respective parties and the matter being orally argued, was submitted to the above entitled Court for decision; and the Court having fully considered all the evidence in the case, makes its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT.

I.

That the petitioners and each of them are residents of the Southern Division of the United States

District Court for the Northern District of California.

II.

That respondent, Wise Manufacturing Company is and at all [29] times mentioned in the petition, was a corporation duly organized under the laws of the State of California, with its principal place of business in the City of Berkeley, County of Alameda, State of California, and that respondent at all of said times prior to the 1st day of May, 1931, was duly authorized to do business in said state and was engaged in the manufacturing, selling and distribution of tools, dies, equipment and patented articles; that on said 1st day of May, 1931, the charter of said respondent was suspended for nonpayment of taxes, and said respondent ceased to be authorized to do business in said state on said day, month and year.

III.

That respondent owes debts to the amount of $1000.00, or over, and is now and at all the times mentioned herein was insolvent and that said respondent is not a wage earner, nor a person engaged principally in farming or the tilling of the soil and is not a municipal, railroad, insurance or banking corporation.

IV.

That petitioners are creditors of respondent who have provable claims against respondent, which

amount in the aggregate, in excess of the value of securities held by them, to $500.00 or over; that the nature and amount of the claims of each of said petitioners are as follows:

Petitioner E. W. Olin has a provable claim against respondent of $239.34, the same being for the balance due and owing upon a judgment rendered against the said respondent, in favor of said petitioner E. W. Olin; that petitioner Ralph Sites has a provable claim against respondent in the sum of $1029.96, of which $450.00 is for the balance due and owing upon a promissory note made by said respondent in favor of petitioner Ralph Sites, of which the sum of $483.96 is for the balance due and owing upon a judgment rendered [30] against respondent, in favor of petitioner Ralph Sites, and of which $96.00 is for work and labor done and performed for and at the request of respondent; that petitioner Berkeley Pattern Works has a provable claim against said respondent in the sum of $183.50, the same being for work and labor done and for goods sold and delivered for and at the request of the said respondent.

V.

That within four months next preceding the date of the filing of the original petitioner here, and within four months next preceding the date of the filing of the amended petition herein, respondent committed acts of bankruptcy, as follows:

(a) That on and prior to the month of September, 1929, and at all times since said date, Roy

T. Wise has been and is the President of respondent corporation and the owner and holder of a majority of its capital stock; that on or about the month of May, 1930, said Roy T. Wise, acquired all of the outstanding common stock of said corporation and is, and ever since said time, has been, to all intents and purposes, the Wise Manufacturing Company; that on or about said month of September, 1929, said Roy T. Wise was authorized and directed by said corporation to negotiate for certain loans to the corporation to assist it in carrying on its business and to liquidate the claims of its then outstanding creditors; that in connection with the efforts of said Roy T. Wise to obtain loans in behalf of respondent, he contacted one Will H. Hays, who in turn introduced the said Roy T. Wise to one Ambrose N. Diehl; that thereupon the said Will H. Hays, Ambrose N. Diehl, and Roy T. Wise entered into negotiations with Westinghouse Electric Manufacturing Company of Pittsburg, Pennsylvania, and as a result of said negotiations obtained an offer of $100,000.00 for the exclusive use of certain patents belonging to respondent, by said Westinghouse Electric Manufacturing Company, for the [31] period of one year, in the eastern states of the United States of America and in Canada; that as an additional consideration for said exclusive use, said Westinghouse Electric Manufacturing Company proposed to pay certain royalties upon each and every article manufactured by said Westinghouse Electric Manufacturing Company under the aforesaid patents; that said Westinghouse Electric

Manufacturing Company, in contemplation of the use by it of said patents, expended large sums of money in altering and adapting its plant for the manufacture of articles under said patents, that said expenditures included a salary of $1000.00 per month to said Roy T. Wise for services in connection with said changes in said plant and in perfecting said patents; that thereupon, to-wit, on or about the 27th day of February, 1930, and with full knowledge of the said offer of Westinghouse Electric Manufacturing Company for the use of said patent and with full knowledge of the value thereof as reflected by said offer for said exclusive use, and otherwise, said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, entered into a certain contract in writing, whereby and wherein it was recited that Roy T. Wise controlled respondent corporation and would cause respondent to transfer and assign to Wise Patent and Development Company, a corporation to be organized under the laws of the State of Delaware by the said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, all of its right, title and interest to certain United States Patents, covering and connected with the Wise Multispeed Transmission, for the sum of $75,000.00, to be paid to the respondent from surplus accumulating over the expenses of operating such proposed Wise Patent & Development Company, at such time as funds should be available; that the said contract further provided that the said Roy T. Wise should proceed to acquire by purchase, all of the outstanding capital stock of respondent, other than the

stock theretofore issued to the said Roy T. Wise, and in [32] effecting such purchase, might use funds from the aforesaid sum of $75,000.00. That thereafter the said corporation, Wise Patent and Development Company, was duly formed under the laws of the State of Delaware and its capital stock issued substantially in its entirety to said Will H. Hays, Ambrose N. Diehl and Roy T. Wise; that thereafter pursuant to the provisions of said contract, the aforesaid patents were transferred to said Wise Patent & Development Company, which in turn entered into a certain contract or contracts with Westinghouse Electric Manufacturing Company, for the use of said patents and received in consideration therefor, certain sums of money by way of cash and loans and other valuable considerations; that subsequent to the assignment of the said patents by respondent to the Wise Patent & Development Company, the consideration provided therefor in said contract was modified by two later contracts, entered into between said parties on May 8, 1930, and September 1, 1930, respectively, which provided for certain contingent payments to respondent, no part of which has been received by respondent.

That the said contract of February 27th, 1930, together with the two later modifying contracts, and all rights of respondent flowing from or pertaining to them or any of them, were assets of respondent.

That the said contract of February 27th, 1930, and all of the transactions arising therefrom and in

connection therewith, whereby said respondent and said Will H. Hays, Ambrose M. Diehl and Roy T. Wise, had acquired without adequate or any consideration were by respondent and said parties concealed from the creditors of said corporation and from its stockholders, other than Roy T. Wise; that to effectuate said concealments said respondent and said Will H. Hays, Ambrose M. Diehl and Roy T. Wise, falsely represented to said creditors and stockholders, that the said [33] patents had been disposed of for the sum of $25,000.00; that in addition to the concealment of said contract and the transactions arising therefrom and in connection therewith, said respondent and said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, further concealed from said shareholders and said creditors of respondent, any possible causes of action against Will H. Hays and/or Ambrose N. Diehl and/or Roy T. Wise, and/or against Wise Patent and Development Company arising out of said contract and/or for the setting aside of said assignment of said patents to Wise Patent and Development Company and/or for damages resulting from the fraudulent acts of said parties, Will H. Hays, Ambrose N. Diehl and Roy T. Wise, in acquiring and converting to their own use, the assets of respondent without adequate or any consideration therefor.

(b) That the said respondent through its president, Roy T. Wise, during the months of June, July and August, 1931, caused to be sold and did sell certain tools, machinery and equipment belonging

to said respondent to persons unknown; that respondent received the approximate sum of six hundred twelve ($612.00) dollars, from said sales; that said sum of six hundred twelve ($612.00) dollars was an asset of respondent, which on or about the month of August, 1931, was concealed by respondent depositing the same in the West Berkeley Branch of the Bank of America, Berkeley, California, in the name of one H. Jacobson, an employee of respondent.

That all of the aforesaid acts of concealment of assets of the respondent, continued from the time of their original commission up to within four (4) months of the filing of the original and amended petitions herein, and the original and amended petitions herein were filed within four months from the discovery of the above mentioned acts of concealment of assets by respondent.

That the aforesaid assets of respondent were concealed [34] as aforesaid with the intent to hinder, delay and defraud the creditors of respondent.

VI.

That respondent is not now engaged in business and has failed and refused to pay any of its creditors.

VII.

The Court further finds that this entire case and the transactions above set forth, on the part of said respondent, and said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, are tainted with fraud and

concealment and warrant a full and complete investigation through the processes of the Bankruptcy Court.

VIII.

The Court further finds that all allegations of the respondent's answer herein, inconsistent with the foregoing findings of fact, are untrue.

CONCLUSIONS OF LAW.

Wherefore the Court concludes as a matter of law from the foregoing facts, that respondent Wise Manufacturing Company should be declared and adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy.

Let an adjudication be entered accordingly.

Dated, May 24, 1934.

A. F. ST. SURE,
Judge of the U. S. District Court.

[Endorsed]: Filed May 25, 1934, 11:33 A. M. Walter B. Maling, Clerk. [35]

[Title of Court and Cause.]

NARRATIVE STATEMENT OF EVIDENCE.

The following is a narrative statement of the evidence taken on the trial of the above entitled cause, which trial occurred on April 4th, 5th, and 6th, 1934.

Mr. Resleure, one of petitioners' attorneys, presented the evidence and examined the witnesses on behalf of the petitioners and Mr. Clark, one of respondent's attorneys, presented the evidence and examined the witnesses on behalf of respondent.

At the opening of the case Mr. Resleure asked Mr. Clark whether Mr. Wise would be present as he desired to examine him under section 2055 of the Code of Civil Procedure and Mr. Clark stated that Mr. Wise was not present.

Thereupon,

F. W. PETERS

was called and sworn as a witness for petitioners and he testified on his direct examination as follows:

"I am an attorney at law, practicing in San Francisco. I became attorney for Professor Franklin Palm, of the University of California, in October, 1932. He had $1500.00 in preferred stock of the Standard Die & Tool Company. I [36] never previously heard of the case which he had instituted in this Court, before my employment. I had been doing some business with Dr. Palm at the University, and he told me that he had had an attorney for over a year, and that he had been trying to get some action. That he had filed a complaint, and that no service had been made on that and that the attorney had filed a waiver of right to take judgment by default against the defendants. He asked me to investigate the case and report back to the preferred stockholders."

(Testimony of F. W. Peters.)

"I was employed by the holders of practically all of the preferred stock of the Standard Die & Tool Company that was still outstanding. I represented Mr. Palm, Mr. Harriman, Mr. McMahon, four members of the Christensen family, and one or two others. They held $11,500.00 worth of stock. The total issue of the preferred stock was $30,000.00. I, acting for them, interviewed Mr. Wise at his home in Berkeley at least twice a week for close to several months, extending from the latter part of November, 1932, through about April or May of 1933. Mr. Wise told me this in these talks extending from a period in November, 1932, until about May, 1933. I had gone down to Mr. Wise's home on an average of twice a week during that period and interviewed Mr. and Mrs. Wise. I filed a substitution of attorneys in the Palm case on February 2, 1933, which was some three or four months after I became acquainted with the case.

Mr. Clark here interposed an objection to the witness' testifying as to the conversations occurring at the meetings referred to, on the ground that it was an attempt to establish corporate concealment in the years 1932, 1933, and no proper foundation had been laid for the purpose of showing that the people with whom the witness talked represented [37] the respondent or had authority to speak for the respondent. That there was no proper foundation laid for the testimony of the witness as to what Mr. Wise said or as to what Mrs. Wise said. As a

part of the basis for the objection the respondent offered the certificate of the Secretary of State, which was admitted in evidence as Respondent's Exhibit No. 1. This certificate recited that the right of the respondent to do business in the State of California was suspended on May 1, 1931, for a failure to pay its corporation franchise taxes, and that the suspension was still in force. The certificate was dated April 3, 1934, and signed and sealed by the Secretary of State. The Court then stated that the objection was good as to the foundation not being laid and the witness proceeded: Mr. Wise was president of Wise Manufacturing Company and also a majority stockholder of both corporations and was in fact the dominating personality of both corporations.

"Mr. Clark then renewed his objection on the ground that the witness was not a stockholder and stated that Mr. Wise had but a few shares of stock in the Wise Manufacturing Company. About 4600 shares in the Wise Manufacturing Company was held by the Standard Die and Tool Company and that Mr. Wise did have a majority of stock in the Standard Die and Tool Company. The witness then proceeded:

"Mr. Wise was president of the Wise Manufacturing Company; Mrs. Wise was the vice-president and the secretary also, and that he knew that from the minutes which he had read. The Court then overruled the objection."

(Testimony of F. W. Peters.)

The WITNESS (proceeded).—"I recognize the document dated December 26, 1930, entitled 'Stockholders Approval of Assignment of Patent and Patent Applications', which Mr. Wise delivered to me and which he stated was the stockholders' approval of assignment of patents. It came from the minute [38] books of the two companies, the Standard Die & Tool Company and the Wise Manufacturing Company. I received it in April, 1933." "Mr. Wise had three executed copies of this document in the books, two of them were duplicates and one of them, I believe, was an original, and I asked Mr. Wise if I might have a copy of it, and he said I might. He gave me this copy."

The document was here admitted as

Petitioners' Exhibit No. 1,

and is as follows:

STOCKHOLDERS' APPROVAL OF ASSIGNMENT OF PATENTS AND PATENT APPLICATIONS.

We the undersigned, being all the stockholders in the Wise Manufacturing Company, a corporation, duly organized under the laws of the State of California, do hereby ratify, confirm and approve the transfer, conveyance and assignment of any and all the patents, interests in patents, patent applications and patent rights heretofore made by the Wise Manufacturing Company and/or the officers of said corporation to Roy T. Wise and/or the Wise Patent

(Testimony of F. W. Peters.)

and Development Company of every kind and nature whatsoever, this ratification, confirmation and consent being irrevocable and in no way dependent upon any condition or conditions whatsoever.

Hereby fully approving the vesting of complete and unconditional title in the Wise Patent and Development Company of all patents, patent applications, patent rights and inventions in the United States of America and elsewhere incident to transmissions, multi-speed-transmissions, clutches, constant mesh, gear transmissions or otherwise, to the extent of any ownership of any legal or equitable interests which the undersigned or any of us have therein.

Dated this 26th day of December, 1930.

STANDARD DIE AND
TOOL COMPANY, INC.
By ROY T. WISE, Pres.
PANSY WISE,
Stockholders.

The WITNESS (continued).—"Mr. Wise explained at that time that the signers of that document constituted all the stockholders of the Wise Manufacturing Company and the directors, and that Mr. Wise was president and a director of both companies, and that [39] Mrs. Wise was a director of both companies. In this period in November, 1932, and for the next three or four months I discussed

(Testimony of F. W. Peters.)
with Mr. Wise his activities in connection with the Hays and Wise deal, in connection with the transfer of the patents to the Patent Development Company."

At this point Mr. Clark renewed the objection to calling for conversations with Roy T. Wise on the ground that the corporation's right to do business was suspended; that the right of Wise to speak for the corporation or to perform any corporate act in the matter of concealment was not authorized and could not have been authorized because of the suspension; that according to the theory of counsel on the other side he was endeavoring to charge Roy T. Wise with appropriation of the patents, the president of the corporation, and that if that was the theory upon which this proceeding was going forward, that Roy T. Wise was wrongfully appropriating the assets of the company, and Wise could not commit an act of concealment for the company, in so far as the corporation was concerned, in his dealings with any of the creditors. The Court overruled this objection, and the respondent excepted.

The WITNESS (continued).—"Mrs. Wise was present at quite a few of the conversations which I had with Mr. Wise. His daughter, Rowena Wise, was also present, and Mr. Cerini, an attorney rep-

(Testimony of F. W. Peters.)
resenting the creditors, was also present at several of the conversations."

Mr. Resleure here produced Resolution No. 23 of the directors of the Wise Manufacturing Company, and the witness testified:

"Mr. Wise showed me the copy of that resolution which was in the minutes. He showed me all the resolutions and all the minutes and all of the books of the company. Mr. Wise loaned me the books of the company for a matter [40] of almost two weeks, and I examined them very thoroughly."

The resolution was here admitted in evidence as

Petitioners' Exhibit No. 2,

and in substance it read as follows:

The resolution recited that it was resolved by the directors of the Wise Manufacturing Company that it should, together with Standard Die & Tool Company, Incorporated, borrow $25,000.00, and subsequently additional sums up to $75,000.00 from Alonzo C. Owens, and any other persons and corporations, and execute a note or notes to evidence the loan and secure the same with a deed of trust or mortgage, real or chattel, and with such other security as the lender or lenders might require for the purpose of retiring and paying the indebtedness of the company and providing funds for its operation, and that the president and secretary be

authorized to obtain the loan for the purposes aforesaid, and that they be authorized to execute the note and security instruments aforesaid, the rate of interest to be paid not to exceed 6%, and that the money derived from the loan should be used for the purposes stated, and that the secretary of the company be directed to deliver to the lender a certified copy of the resolution, with corporate seal attached to the resolution. Attached to the resolution was the secretary's certificate, signed by the secretary, E. W. Olin, reciting that he was the secretary of the Wise Manufacturing Company, and that the resolution was a full, true, and correct copy of the resolution of the Board of Directors of the Company, which was regularly adopted on May 26, 1930.

At this point, Mr. Resleure asked the witness as to whether Mr. Wise showed him the contract of February 27, 1930, mentioned in the amended petition, and Mr. Clark renewed his objection to testimony of the witness as to the statements and conduct of Wise on the ground that his declarations could not be binding on the respondent, and that it was obvious that the testimony related to the latter part of the year 1932 and the beginning of the year 1933. The Court again overruled the objection, the respondent noting an exception.

Mr. Resleure then produced a photostatic copy of the contract of February 27, 1930, mentioned in

the amended petition and this was admitted in evidence as the

Petitioners' Exhibit No. 3.

It read, as follows:

THIS AGREEMENT, made and entered into this 27th day of February, 1930, by and between Roy T. Wise, of Berkeley, California, party of the first part, and [41] Ambrose N. Diehl of Pittsburgh, Pennsylvania, and Will H. Hays of Sullivan, Indiana, parties of the second part, witnesses that:

WHEREAS, the party of the first part has invented and has patents issued and pending on certain useful devices specifically for the object of applying various transmission speeds to Induction Motors and has other patents relating to this form of apparatus pending and has designed apparatus for the carrying out of the above said change of speed of transmissions and has already marketed some of these machines to purchasers, such patents and applications including the following, to-wit:

	Serial No.
Wise Application Three-Speed Transmission Filed June 6, 1928	283,249
Issued into Patent No. 1,745,075	
Wise Constant Mesh Gear Transmission Clutch Filed July 17, 1929	378,862
Wise Constant Mesh Transmission for Electric Motors Filed July 24, 1929	380,634

	Serial No.
Wise Transmission Clutch Filed August 1, 1928	296,659
Wise Constant Mesh Gear Electric Motor Transmission Filed June 6, 1928	283,248
Wise Two-Speed Transmission Filed June 6, 1928	283,247
Wasbauer Application Three-Speed Constant Mesh Gear Electric Motor Transmission Filed January 4, 1928	244,434

and,

WHEREAS, said party of the first part has been instrumental in the organization of the Standard Die and Tool Company, Incorporated, and the Wise Manufacturing Company, both California corporations, and has caused such action to be taken as that there is now lodged in said Wise Manufacturing Company rights and interests in all of the patents and applications above referred to, and, [42]

WHEREAS, the party of the first part owns or controls Six Hundred Sixty (660) shares of the Common Stock and Five (5) shares of the Preferred Stock of the Standard Die and Tool Company, Incorporated, with Thirty-four (34) shares of the Common Stock and Two Hundred Fifty-eight (258) shares of the Preferred Stock of said Standard Die and Tool Company, Incorporated, owned by others, being all of the Common and

Preferred Stock of said Standard Die and Tool Company, Incorporated, which is issued and,

WHEREAS, the Standard Die and Tool Company, Incorporated, is the owner of Four Thousand Six Hundred Seventy (4,670) shares of Common Stock of the Wise Manufacturing Company with Two Hundred Sixteen (216) shares of said Common Stock owned by others, and Fifty-five (55) shares of said Common Stock subscribed for by others, being all of the stock of the said Wise Manufacturing Company issued or outstanding except Two Hundred Sixteen (216) shares of Common Stock issued in escrow to be the property of the Wise Manufacturing Company under certain conditions, and,

WHEREAS, said party of the first part believes it to the best interests of the said Wise Manufacturing Company for said Wise Manufacturing Company to sell all of its rights and interests in all of the patents, applications and rights above referred to and the best interest of all the stockholders of said companies so to do in order that said Wise Manufacturing Company may devote its activities to its tool and other businesses than that resulting from said patents and applications above referred to, and

WHEREAS, said party of the first part has approached the parties of the second part for the purposes of such assistance as they may be able to render in the promotion [43] of said patents and applications and the activities incident thereto and

has asked said parties of the second part to become stockholders in a company to be organized to acquire said patents, applications and rights and for all of the purposes above outlined, and said parties of the second part have agreed so to do and have actively engaged in such requested action, and

WHEREAS, certain expenditures have been made by the party of the first part, and the said Wise Manufacturing Company in the design, manufacture and marketing of such apparatus to the extent of approximately Fifty Thousand Dollars ($50,000.00), and

WHEREAS, the party of the first part controls and can cause any purpose herein agreed to to be executed by the said Wise Manufacturing Company and the Standard Die and Tool Company, Incorporated;

Now, in consideration of the mutuality hereof and the sum of One Dollar ($1.00) each to the other paid and for other valuable and sufficient considerations, the receipt of all of which is hereby acknowledged, it is agreed by and between the parties hereto as follows:

1. That a corporation shall be organized to be called the Wise Patent and Development Company, by charter issued by the State of Delaware, for the purpose of holding all of the above mentioned patents and applications and all the supplementary patents for the specific piece of apparatus above described and for the purpose of investigating, holding, developing and promoting this as

well as other patents of merit which may be accepted by the said company, either by purchase, invention, or on a royalty or other basis, including specifically the patents [44] already issued to the party of the first part for the Wise Multi-Speed Transmission and all applications for patents pending relative thereto;

2. That the capital stock of the said corporation shall consist of Twelve Hundred (1200) shares of no par value Common Stock, Three Hundred Thirty-three and One-third (333 1/3) shares of which shall be issued to the party of the first part, Six Hundred Sixty-six and Two-thirds (666 2/3) shares to the parties of the second part on the basis of Three Hundred Thirty-three and One-third (333 1/3) shares to each of said parties of the second part; and Two Hundred (200) shares shall be left in the treasury for such purposes as may be decided upon by the Board of Directors of said Company; provided, however, that One Hundred (100) shares of the said Two Hundred (200) shares shall be issued to the party of the first part at the time of the issuance of the One Thousand (1,000) shares above referred to, which said One Hundred (100) shares is to be used by the party of the first part in the complete discharge and release of the said party of the first part and said patents, applications and rights from any and all claims, if any, against said party of the first part or his assignees or the said Wise Patent and Development Company or the Standard Die and Tool Company, Incorporated, or the Wise Manufactur-

ing Company by B. K. Gillespie of Los Angeles, California, and Owen B. Smith of Oakland, California, or either of them; provided, however, that such One Hundred (100) shares so to be issued for such purpose to the party of the first part shall be so used by him as that the voting right in said One Hundred (100) shares remains in the party of the first part and the parties of the second part all jointly for a period of two (2) years from [45] the date of issue; it being understood that while there is no legal claim against the party of the first part by said B. K. Gillespie and said Owen B. Smith, the party of the first part desires to reward them for certain services heretofore rendered by them in indirect relation to this transaction. It is understood that all of such stock shall be issued fully paid up and non-assessable in exchange for such assignments of such patents, applications and rights, all as herein provided for, which said party of the first part herein undertakes to cause to be so assigned;

3. The By-Laws of the Company shall provide for a President, Vice-President, Secretary and Treasurer and a Board of Directors of five (5) members, including the executive officers;

4. The party of the first part agrees to assign or cause to be assigned to said company when organized all of the patents and applications for patents above described and all rights and interest in all patents pending covering or connected with said Wise Multi-Speed Transmission and any pat-

ents for any improvements of said apparatus which may be later by him devised; said party of the first part representing that such patents and applications are either now owned by him or by the said companies which he controls and whose execution of the commitments herein made by him he can require;

5. The parties of the second part shall advance all expenses necessarily incurred in the organization and incorporation of said company, and in addition shall advance into the treasury of the said company an amount necessary to enable said company to refund to the party of the first part forthwith the sum of Six Hundred Fifty Dollars ($640.00) in cash involved in some incidental [46] immediate personal expenses and to enable said company to proceed immediately with an investigation of said patents to the satisfaction of the said company and the parties of the second part;

6. It is understood that such company's powers shall include the right to own patents and sell the same outright; to retain the right to manufacture exclusively; to grant licenses for fixed fees or on a royalty basis or on a combination of the above; for the manufacture under such patents as are owned or controlled by it, and that all fees from such sale, manufacture or licenses shall go directly into the company's treasury; and that such company shall have such other rights usually appertaining to such type of corporations;

7. It is further agreed by the parties hereto after such patents and rights are vested in said

company, all as herein provided for, that such company shall further endeavor to develop by license, sale or otherwise the said device known as the Wise Multi-Speed Transmission, with all improvements thereon, and shall further proceed so to develop, market and license any other patents of merit which may be accepted by it to the best of its ability and from the proceeds received by the said company for such activity cash payments up to the sum of seventy-five thousand dollars ($75,000.00) shall be made to the Wise Manufacturing Company from surplus accumulating over the expense of operating such proposed Wise Patent and Development Company at such times as funds are available; such payment of such sums up to said seventy-five thousand dollars ($75,000.00) to be by way of reimbursement to the party of the first part and the California companies above mentioned which he controls for expenditures to date in connection with the de- [47] velopment of the patents, together with substantial addition. It is understood that neither the physical properties nor any of the capital stock of the Wise Manufacturing Company are to be transferred at this time to the Wise Patent and Development Company as any part of the transaction;

8. After the said sum of seventy-five thousand dollars ($75,000.00) is paid to the Wise Manufacturing Company, then all monies received by the Wise Patent and Development Company shall be the property of the stockholders on the basis of the stock ownership above set out, also on the dissolution or sale of the company the funds remaining

after all debts are paid shall be distributed on the above mentioned basis.

9. The party of the first part agrees to proceed immediately to secure ninety (90) days' option on all of the preferred and common stock issued and outstanding in the Standard Die and Tool Company, Incorporated, other than that already issued to him and to proceed immediately to take ninety (90) days' options on all of the capital stock of the Wise Manufacturing Company other than that already issued to him; the purpose of the party of the first part in such action being so to acquire such control of all such stock in order to have entire ownership of the Wise Manufacturing Company at the time the assignments of the patents and applications referred to herein are to be made to the Wise Patent and Development Company by the party of the first part or by the Wise Manufacturing Company or otherwise. This is all to the end that the party of the first part shall be one hundred per cent (100%) owners of the Wise Manufacturing Company and consequently in complete control of all of its patents, applications, rights and other assets [48] and will thereby be in position completely to effect all of the assignments and transfers contemplated by the provisions of this agreement, which assignments in Article 4 above he specifically agrees to execute. The consideration for such assignments of all of such patents, applications and rights by the party of the first part, the Wise Manufacturing Company or otherwise, shall be the seventy-five thousand dollars ($75,000.00) referred to in

Article 7 above and the issuance of all or any part of the stock as the parties of the second part may elect to the party of the first part or to the Wise Manufacturing Company, with the understanding that re-assignments of such stock of the Wise Patent and Development Company will be made as that the ownership of such stock shall be as outlined in Article 2 above. It is understood that the party of the first part in so developing the one hundred per cent (100%) ownership in the Standard Die and Tool Company, Incorporated, and the Wise Manufacturing Company and exercising such options to purchase stock therein may use funds from the seventy-five thousand dollars ($75,000.00) mentioned in Article 7 above. It is understood by all of the parties hereto that such options so taken by the party of the first part of the stock in such California companies are not to be exercised by the party of the first part until directed so to do by the parties of the second part. It is further understood that the parties of the second part are hereby only obligating themselves to the extent of advancing funds to the proposed Wise Patent and Development Company for the purposes set out in Article 5 above, and that such further obligations indicated herein are at the option of the parties of the second part after such investigation of said patents and other investigation as they see fit to [49] make has been concluded to their satisfaction.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals and exe-

(Testimony of F. W. Peters.)

cuted this instrument in triplicate the day and year first above written.

[Seal] ROY T. WISE,
[Seal] WILL H. HAYS,
[Seal] AMBROSE N. DIEHL.

The WITNESS proceeded:

"At one of their first meetings Mr. Wise showed him a list of creditors who had been paid and told him he had received $25,000 for the patent."

Mr. Clark renewed his objections and stated that his objections went to all of this on the ground that Mr. Wise could not at this date be representing a corporation, and requested the Court to note the fact that counsel for the other side had designated Mr. Wise as one of the "unholy three", and that Mr. Clark supposed that counsel for the other side's contention was that Mr. Wise was engaged in stealing these patents from the company. That, if that be true, Mr. Wise certainly did not commit an act of concealment under the authority of the board of directors and the stockholders of that company in the process of taking that particular property. The Court overruled the objection, the respondent excepting.

(Testimony of F. W. Peters.)

The WITNESS continued:

"Mr. Wise told me that he had received $25,000.00 for the sale of the patents to the Wise Patent and Development Company of Delaware. That was only told me after about three months of conversation with Mr. Wise and my trying to ascertain what had happened to the patents, who held them and what had been received for them as consideration. The Wise Patent and Development Company was the [50] corporation that was formed in the east by Mr. Hays, Mr. Wise and Mr. Diehl. After about three months I had all my notes together, and I had a complete picture of the entire deal, and I went down to Mr. Wise's home one evening, and told him—well, I asked him what had become of the patents, who held them at that time, and what had been received for them. This was the first time he ever mentioned it. He brought out this contract of February 27, 1930, and he told me that he and Mr. Diehl and Mr. Hays had entered into the contract in New York on that day and that no one had ever seen that contract outside of those three persons, and that he would be willing to let me look it over with the understanding that I would not disclose the contents of the contract to anyone. I told him I could not do that, but that I would not disclose it any more than would be necessary to make my report. He told me that Mr. Hays had at that time all of his personal stock pledged for various notes, and that Mr. Hays and Mr. Diehl would be exceedingly angry if they ever learned

(Testimony of F. W. Peters.)

that he had shown me this contract. He asked me not to show the contract to anyone; there was no difference as to showing it to creditors. There were no exceptions. The way it came about that he showed me this document although I represented preferred stockholders was that I had been going down there and getting the story and seeing the various creditors and stockholders, and I had gotten in touch with various directors of both corporations, and I had a pretty fair picture in my own mind of what had happened, and the only thing I could not find was the consideration for the transfer of the patents, and I told Mr. Wise that there was absolutely no consideration received by the Wise Manufacturing Company for the transfer, and he said, 'Yes, there was consideration received' and that he had this contract which he had entered into in the east, and that that was consideration for the patents, and then he [51] told me of the escrow which was handled through the Bank of America. I did not receive this contract dated February 27, 1930, until February 23rd, 1933, about three months after I first contacted Mr. Wise.

I know when the petitioning creditors first became acquainted with this contract. I told Mr. Cerini, who represented the creditors, about the contract the next day, but I do not believe I showed him the contents until about two weeks later. I showed Mr. Cerini the photostatic copy that I had made of that contract about two weeks later. Mr. Wise had told me I could have it only over night,

(Testimony of F. W. Peters.)

and so for that reason in order to investigate the contract, and study it I had had a photostatic copy made. I told Mr. Wise that I had had a copy made, although not that it was a photostatic copy, and he told me not to display it to anyone. He told me the same thing he said the night before, not to show the copy to anyone.

He told me about this escrow No. 167. During the period of three or four months of conversation I met Mr. Wise once or twice a week for that period. Mr. Resleure then asked Mr. Clark if he had the copies of notices that his office, Clark, Nichols & Eltse sent out to stockholders and creditors, production of which was asked by a notice to produce.

Mr. CLARK.—I cannot find the copies. I do not know who sent them, whether it was sent from our office or sent from the Wise Manufacturing Company.

Mr. RESLEURE.—I will show it to you, Mr. Clark.

Mr. CLARK.—To tell you the truth—I have no copies of that (indicating).

The witness stated that there were copies in the escrow which Mr. Scott had. Mr. Resleure then produced a document which the witness recognized as a copy of a notice sent to all the common stockholders of the Standard Die & Tool [52] Company and the Wise Manufacturing Company, asking them to deposit their stock in escrow with the Bank of America and requesting a ninety day extension of the option to purchase the stock which had already

(Testimony of F. W. Peters.)

been deposited in escrow. It appeared that the notice was not dated but the witness testified that it accompanied an option which was dated May, 1930. Mr. Resleure then produced a document which it was stipulated, was a copy of the original form of option and it was also stipulated that the second form of document was a copy of the extension of the option, whereupon the original form of option was admitted in evidence as

Petitioners' Exhibit No. 4.

The same reads:

OPTION

In consideration of $1.00, receipt being hereby acknowledged, and without cost to me, I hereby escrow with Bank of America, First Berkeley Branch, the shares of stock described below hereby giving to M. R. Gilbert and/or assignee an option for ninety (90) days from date to purchase said stock at the net price per share as indicated below, to-wit:

Company	Certificate No.	No. of Shares	Price Per Share

Dated: , 1930.

The WITNESS then continued:

"Mr. R. Gilbert referred to in the option was the person at the bank who handled this escrow."

"Mr. Wise told me that the majority of the common stock had been taken up at par, and that some

(Testimony of F. W. Peters.)
few stockholders who owned both common and preferred stock refused to sell common without a sale also of the preferred, and that in these instances both the preferred and the common stock had been purchased. Mr. Wise told me that this form of option had been accompanied by a letter from Mr. Eltse, representing Clark, Nichols & Eltse."

"Mr. Resleure then stated that before the conclusion of the trial he would call for a copy of the letter which accom- [53] panied the original option and then stated that in view of Mr. Clark's stipulation he would offer in evidence the document entitled "Extension of Option" dated May, 1930, which document was received in evidence and marked

Petitioners' Exhibit No. 5.

EXTENSION OF OPTION

In consideration of the obtaining of other like extensions from other stockholders by the optionee, the option heretofore given M. R. Gilbert and/or assignee to purchase my stock in the Standard Die and Tool Company, Inc. and the Wise Manufacturing Company (strike out the Company in which no stock held) is hereby extended for the period of Ninety (90) days from the date of expiration of said option.

Dated: May....., 1930.

(Testimony of F. W. Peters.)

The witness then testified that he took a copy of the letter accompanying the extension of option and asked Mr. Wise to explain it to him, whereupon a copy of that letter was produced and the witness identified it as the letter addressed to the stockholders of Standard Die and Tool Company and Wise Manufacturing Company and signed by Clark, Nichols & Eltse by Ralph E. Eltse, the copy being undated. The witness identified it as an exact copy of the letter which he had taken to Mr. Wise when requesting explanation. Mr. Resleure then offered the copy of the letter to the stockholders signed by Ralph E. Eltse with lead penciled figures "E S. C. 167" in evidence as

Petitioners' Exhibit No. 6".

The same read:

(No date)

"To the Stockholders of Standard Die and Tool Company and the Wise Manufacturing Company:

You are requested to grant to M. R. Gilbert and/or assignee a ninety day extension of option to purchase your stock, for the following reasons:

(a) Certain of the stockholders in the companies [54] are deceased and additional time is required to effect a transfer of their stock from their estates to the optionee, and probate proceedings are necessarily slow.

(b) Details have not yet been completed in connection with advances being secured from eastern capitalists, proceeds of which are to be used in

liquidating present outstanding creditors' claims and in providing funds to the optionee with which to take up the stock under the options. The parties making the advances will not close until they have made a thorough examination of the corporations and assets, including the patents and applications for patents. Patents on several of the applications have not yet been issued, and approximately ninety days will be required before the patents can possibly be issued on the applications. The lenders are carefully checking the patent records at Washington.

Unless the requested extension is granted to the optionee it is doubtful if the creditors' claims can be liquidated and it is feared the creditors will take precipitate action which will mean the stockholders will suffer loss.

You are assured and advised that no more money is to be obtained than is necessary to liquidate the outstanding creditors' claims and to take up the options for the purchase of the stock at its par value.

We solicit your cooperation by the prompt execution and return of the enclosed extension of option.

For your convenience a self-addressed envelope is enclosed herewith.

Yours truly,
CLARK, NICHOLS & ELTSE
By Ralph R. Eltse."

(Testimony of F. W. Peters.)

The WITNESS, PETERS, continued:

"Referring to that letter and to the statement that [55] the creditors might cause trouble, I will say that I talked with Mr. Wise about the connection of that letter with the contract and I pointed out that the contract had already arranged for the formation of the eastern corporation and the payment to the Wise Manufacturing Company of this money. He had shown me the minutes where he raised $25,000.00 on a chattel mortgage and he told me that the creditors were all paid through the escrow No. 167 through money received from Hays in May, 1930, which was the month in which the option was dated."

Mr. CLARK.—"Is it stipulated that the mortgage referred to was a mortgage made to A. C. Owens, of the firm of Hays & Hays, which includes Will H. Hays?

Mr. RESLEURE.—"That is our belief that that is the same mortgage. The only mortgage we find of the identical amount was to Mr. Owens which was put on record".

"As the option was dated in May, 1930, I wanted to know of Mr. Wise why this letter had been sent to the stockholders threatening action on behalf of the creditors when a contract had already been made in the east providing for funds to be sent out to pay creditors and to take up the stock. I do not remember what the answer was. He showed me a statement of creditors who had been paid, amounting to some $24,000.00 I believe, and it showed as a

(Testimony of F. W. Peters.)

credit, "received from the Wise Patent & Development Company $25,000.00", and I asked Mr. Wise what that was for and he told me that was money received from the sale of the patents. "It was at that time and all through the early months that I believed the patent had been sold for $25,000.00". It was not until I saw this contract on February 23, 1933, that I found that this $25,000.00 that came through the escrow in the Bank of America was the check received on the chattel mortgage on equipment. [56] Mr. Wise told me that two checks had come through the escrow and that both were signed by Will Hays, one for $25,000.00 to pay creditors and the other for $20,000.00 to take up common stock. "I also found that the checks had come through the escrow from an employee of the Bank of America, as well as from Mr. Wise". He told me that the patents sold for $25,000.00 and I asked him about the preferred share holders and where they were coming into the picture. I told him that the creditors had been paid but that there were still $25,000.00 worth of preferred share holders. I asked him why the Wise Manufacturing Company, which had received $75,000.00,—why the preferred stock had not also been taken up; and at that time, he told me that—he believed while he was east that the common stock was the only stock that had a vote, although actually the preferred stock also had a vote in the Standard Die & Tool Company; and I asked him what was going to be done with the money, and he said he was acting for the best in-

(Testimony of F. W. Peters.)
terests of the corporation and of the shareholders, because he was going to be able to take in the common stock at par, and I asked him how much that would take and he said approximately $18,000.00 or $19,000.00, and I asked him what was to be done with the difference between the $75,000.00 he would receive and the $19,000.00. I asked him what had become of the rest of the money and at that time Mr. Wise did not answer and that is something I never did get an answer to.

"Mr. Wise stated that when he was east he believed the preferred stock did not have a vote. He found out in the meantime that it did have a vote. I had a share with me and we went over it."

"In 1931, Will Hays was out here on the Pacific Coast stopping at the Mark Hopkins Hotel in San Francisco. Some [57] of the preferred shareholders, mainly Mr. McMahon, was destitute and needed money, and had been writing to Mr. Hays asking him to redeem his stock; they held a meeting, some of the preferred shareholders, in the Mark Hopkins Hotel, in which Mr. White was present, Mr. McMahon, Mr. Hays, Mr. Dobrzensky, representing Mr. Hays, and at that time they entered into an agreement whereby the majority of the preferred shareholders agreed to deposit their stock in escrow with Mr. Woolsey, in Berkeley, reciting a consideration of one dollar, and they waived all of their claims against the corporation and gave them release of all claims, and agreed at that time to take any money they would ever get, from Mr. Wise's one-

(Testimony of F. W. Peters.)
third interest in the Wise Patent and Development Company.

"Mr. Wise told me what I am now stating. He told me that most of the preferred shareholders—all with the exception of $11,500.00 outstanding at the present time—deposited their preferred stock with Mr. Woolsey with the understanding Mr. Wise's share in the eastern corporation was to be paid to Mr. Woolsey, to pay back to the preferred shareholders, and at the same time he told me all of his stock in both the eastern corporation and western corporation was pledged to Mr. Hays for the advances which he had made to purchase the common stock out here, and for the advances he had made on the Berkeley note secured by the chattel mortgage and for the endorsement of the Westinghouse note for $40,000.00, so that, at that time Mr. Wise told me his stock was held in pledge by Mr. Hays.

"I had discussion with him regarding the provisions of the contract of February 27, 1930, permitting him to use the $75,000.00, or part of the $75,000.00 to buy up stock of [58] the Wise Manufacturing Company outstanding in the names of others. He told me that this contract provided for $75,000.00 to be received out of surplus. At that time he said he had been negotiating and working for the Westinghouse Electric Company, perfecting tools and equipment for them to manufacture this multispeed transmission. He said the engineer of that company had offered them $100,000.00 for an

(Testimony of F. W. Peters.)

exclusive license for the use of the patent. This he told me was prior to the stock market crash in 1929. The negotiations between Wise, Hays and Diehl in the formation of the Wise Patent & Development Company had not been completed at that time and the common stock had not been purchased out here at that time, and the negotiations were still hanging fire with Westinghouse.

"Wise said that a few months later Westinghouse had reduced their offer to $75,000.00 for the exclusive license for the patent, and that after the transfer of the patents from Wise Manufacturing Company to Wise Patent and Development Company, they were willing to give only $10,000.00 cash and make a loan of $40,000.00. He said that this $40,000.00 was paid to Hays for the Wise Patent & Development Company and then from that $40,000.00 he was given the $19,000.00 to purchase the outstanding common stock in this escrow; that the balance of the $40,000.00 was used for them to pay attorneys' fees, $2000.00 to Clark, Nichols & Eltse, $4000.00 or $5000.00 to patent attorneys in the east and then there were also some miscellaneous items making up a total of $40,000.00.

"Q. In the attorneys' fees, he mentioned a payment of $3,250.00 to Hays and Hays?

A. Yes; he gave me a letter which he had received from Lon Owens, Mr. Hays's attorney, [59] in answer to his letter to Mr. Owens asking what had happened to the $40,000.00 which had been borrowed from Westinghouse.

(Testimony of F. W. Peters.)

"Q. Did he ever admit, state to you, or say anything, concerning the concealment of the contract of February 27th?

"A. He told me no one had ever seen that contract outside of himself, Mr. Hays and Mr. Diehl, until the day I saw it.

"Q. Did he say anything about concealment of the $40,000.00 loan and the $10,000.00 cash payment?

"A. Mr. Wise told me no one knew of the disposition of the money; he did not know himself until he had received this letter from Mr. Owens. That was the first time he knew what had happened to the $40,000.00.

"The witness was next questioned as to what Wise told him as to his ability to close the deal, or the willingness of the Westinghouse Company to have closed immediately, had it not been for the delay occasioned in getting this patent company so that Diehl and Mr. Hays and himself could take over the stock in that company which was to make the money. The witness replied that Wise said that it was a mistake that they did not go ahead with it originally because the Westinghouse Company had spent a great deal of money changing their plant and manufacturing tools with which to make the multispeed transmission, and at that time they could have closed for $100,000.00 for an exclusive license but for the delay in getting the patent company so that Diehl and Hays and himself could take over the stock in that company which was to make

(Testimony of F. W. Peters.)

the money. He explained that the thing that caused the deal to fail was that they had to have the transfer of the patents from the Wise Manufacturing Company to the Wise Patent & Development Company [60] because the Westinghouse Company would not go ahead with the deal until the Wise Patent & Development Company had a clear title to the patents."

At this point, the following stipulations were made with respect to the deposit of $605.00 with the Bank of America, West Berkeley Branch, mentioned in the amended petition:

"Q. Now, did you ever have any conversation with Mr. Wise in regard to the $605.00 on deposit with the Bank of America, West Berkeley Branch, in the name of H. Jacobsen?

A. Yes, I did.

"Mr. CLARK.—Can't we stipulate as to the facts with regard to that?

"Mr. RESLEURE.—Yes, I think we can.

"Mr. CLARK.—I have the letter here from Miss Jacobson, showing her withdrawal of the final balance of the account in 1931, in November, charging against that final balance a claim for salary of approximately $350.00, and remitting the balance of it to Clark, Nichols & Eltse, advising us that if we cared to communicate with her further in regard to it, we should refer to her attorney; that she had this bill for unpaid secretarial services; and the $150.00

was in November—approximately $150.00—was in November, 1931, paid to our firm on account of attorney's fees, and the account was closed, and I have here the letter showing the account was closed in November, 1931.

"Mr. RESLEURE.—Well, I do not think I can go that far with the stipulation. As far as I am willing to stipulate, you have the date the account was opened——

"Mr. CLARK (interrupting). I have that in the form of a letter from Mr. Sorrick, the manager of the Berkeley Branch of the Bank of America. [61]

"Mr. RESLEURE.—If you will show me the letter, I will tell you what I am willing to stipulate.

"Mr. CLARK.—I will show you the letter from the lady.

"Mr. RESLEURE.—I am not interested in the letter from the lady, because I think we ought to have her here to cross-examine her.

"Mr. CLARK.—When she got down to $430.00, she took the balance. Here is her letter. I can give you the exact deposits. Here is a letter signed by Mr. Sorrick, the manager of the West Berkeley Branch of the Bank of America. These deposits were in the West Berkeley Branch of the Bank of America.

"Mr. RESLEURE.—I will go ahead and make the stipulation we are willing to make. We will stipulate that an account was opened in the name of Huldur Jacobsen on June 25, 1931; that the deposits in this account totaled $612.00; that the ac-

count was closed on November 23, 1931, by the withdrawal of the balance, which existed at that time, namely: $430.00. That is stipulated?

"Mr. CLARK.—That is stipulated, yes.

"Mr. RESLEURE.—Now, will you also stipulate that the funds that went into that account in the name of Huldur Jacobsen represented moneys of the Wise Manufacturing Company and were derived from the sale of small tools belonging to the Wise Manufacturing Company?

"Mr. CLARK.—That is right.

"Mr. RESLEURE.—And will you further stipulate, as your answer indicates, that the object in putting this money in the name of Huldur Jacobsen was to prevent any of the creditors of the Wise Manufacturing Company ascertaining the existence of these funds and making possible attachment thereon? [62]

"Mr. CLARK.—Well, it was the usual practice of putting funds in there to avoid their being attached. We so stipulate; the funds put in the name of Huldur Jacobsen; deposits put in her name to avoid of it being attached by the creditors.

"Mr. RESLEURE.—And will you further stipulate that these funds were concealed from creditors and from all other persons by the respondent in this manner, having the account in somebody else's name?

"Mr. CLARK.—Well, I think the Court can draw its conclusion that it was a practice perhaps to be condemned. I do not want to stipulate to that conclusion.

"Mr. RESLEURE.—All right.

"Mr. CLARK.—Now, that I have stipulated to that, will you not stipulate that the account was closed, as indicated by that letter sent by Huldur Jacobsen?

"Mr. RESLEURE.—No, I am afraid I cannot go that far, much as I would like to return your courtesy. I would like to have Miss Jacobsen, who is a former employee, here to cross-examine her as to what happened to these funds.

"Mr. CLARK.—Paid out all of them down to that point, under the direction of Mr. Wise.

"Mr. RESLEURE.—We will stipulate that the funds were paid down to $184 on November 28th, at the direction of Mr. Wise.

"Mr. CLARK.—That is right.

"Mr. RESLEURE.—That is what you want?

"Mr. CLARK.—Yes; that is right, $184.45.

"Mr. RESLEURE.—Apparently this conflicts—but we will let our stipulation stand.

"Mr. CLARK.—She was written to for the balance of the money, and she was then down at Turlock. Instead of [63] sending the balance of the money,—$530,—and the bank records show it, she had the account transferred to herself at Turlock,—the balance of $530. She then sent a letter to Clark, Nichols & Eltse, reciting that she had withdrawn from the account $345.55 unpaid salary, salary earned prior to April 18, 1931, leaving a balance of $184.45. She enclosed the check to us for that amount. The bank records show she withdrew the

$530 on the date indicated in the other letter from which you were reading——

"Mr. RESLEURE (interrupting).—$430——

"Mr. CLARK (interrupting).—Well, that is a clerical mistake. May I correct that? That is just Mr. Sorrick's stenographer's clerical mistake.

"Mr. RESLEURE.—Yes, go ahead, stipulate it was $530.

"Mr. CLARK.—Yes, $530.

"Mr. RESLEURE.—In my original stipulation —in other words, in the first stipulation that I narrated, the amount that I stated of $430, being the balance on hand, should have been $530, and the mistake was due to a clerical error in the letter.

"Mr. CLARK.—I think our stipulation is perhaps unfinished. You stipulate the lady did withdraw the $530 as indicated by Mr. Sorrick, or do you want me to call him over here? It is useless.

"Mr. RESLEURE.—Yes, we will admit the $530 was withdrawn.

"Mr. CLARK.—By Huldur Jacobsen?

"Mr. RESLEURE.—All right; by Huldur Jacobsen.

"Mr. CLARK.—And that she kept $345.50 of it, and remitted the balance to Clark, Nichols & Eltse. This letter shows it. [64]

"Mr. RESLEURE.—Well, I think we are in hopeless confusion with the stipulation. The letter, as a matter of fact, shows she sent you a check for $184.45.

"Mr. CLARK.—That is what I said.

"Mr. RESLEURE.—But she did not withdraw the entire $530.

"Mr. CLARK.—No. Get this: The account was deposited in the West Berkeley Branch of the Bank of America. She was a clerk of some kind in the Wise Manufacturing Company. She moved to Turlock. When she was requested to remit the balance of this particular account which was deposited in her name, she saw a lawyer—she indicates in her last paragraph she had seen a lawyer—and the bank records show she called for $530 to be sent to the Bank of America, the branch at Turlock; and she then sent to us a statement showing that she had taken from the $530, $345.55, and she remitted to us the balance.

"Mr. RESLEURE.—All right. We will stipulate to everything that Mr. Clark says, except we won't stipulate that the $184 went to pay attorneys' fees, and we won't stipulate that the $345.55 went to pay prior salary. You can testify, yourself, as to that.

"Mr. CLARK.—I have been trying to aid you by stipulating to records. Do you want me to take the deposition of Huldur Jacobsen?

"The COURT.—I think you gentlemen will be able to agree on that.

"Mr. CLARK.—She took the money, we never have been able to collect it.

"Mr. RESLEURE.—All right, we will agree to it.

"Mr. CLARK.—And will you stipulate we got $184.85 on account of attorneys' fees? [65]

"Mr. RESLEURE.—Yes.

(Testimony of F. W. Peters.)

"Mr. CLARKE.—At that time, November 28, 1931.

"Mr. RESLEURE.—Well, let me see? Where is your other letter—yes, approximately that time.

"Mr. CLARK.—All right."

The WITNESS PETERS (continued).—"I know that Mr. Wise told me the money (referring to the money mentioned in the foregoing stipulation) was deposited in Miss Jacobsen's name, and he told me also that she had withdrawn the greater part of it to pay her salary.

"In answer to a question as to whether he had heard Mr. Clark's statement here that only $200.00 had been received by the Patent and Development Company from Westinghouse on commissions or royalties, and whether it was correct, Peters stated in substance:"

"I only know what Mr. Wise told me. He explained the original contract with Westinghouse, and stated that it provided for royalties of so much for each machine and half of the royalties were to go to Westinghouse Manufacturing Company to reduce the loan of $40,000.00, and that Mr. Wise stated that they figured this would be retired within two years from royalties, and the other half was to go to the Wise Patent and Development Company, for distribution to the stockholders, and up to the time I talked with Mr. Wise last February or March there had been approximately $5000.00 worth of

(Testimony of F. W. Peters.)
royalties received. Over half of it had been paid to Wise Patent and Development Company, but at that time the note of $40,000.00 had fallen due, and in renewing it they had agreed that all further royalties should be retained by Westinghouse Company to apply on the note. I do not think that Mr. Wise knew exactly [66] what was happening to the $40,000.00 note. He said Mr. Hays was handling that, and that for any information he wanted he had to go to Mr. Owens. I suggested, in fact, that he should write to Mr. Owens for me.

The testimony of the witness, Peters, was here interrupted to place the witness,

FLOYD B. CERINI,

on the stand, who being first duly sworn testified for petitioners as follows:

"I am an attorney practicing at Berkeley; I am one of the attorneys for the petitioning creditors. I know Roy T. Wise. I recall a conversation between Mr. Wise and Mr. Peters relative to the contract of February 27, 1930 (the contract referred to in the evidence). This was at Mr. Wise's house; it was probably the first week in March, 1933."
"Present at Mr. Wise's home in Berkeley at this conversation, were Mr. Peters, Mr. Wise, myself, and Mrs. Wise."

(Testimony of Floyd B. Cerini.)

At this point Mr. Clark renewed the preliminary objections which he had made to the testimony of witnesses as to what Mr. Wise said, stating that there was nothing to show that Mr. Wise had authority to make admissions which were binding on the corporation, and that as the right of the corporation to do business was suspended and the testimony was for the purpose of showing facts in concealment and at that particular time, Mr. Wise could not practice concealment. The objection was overruled, the respondent noting an exception.

The WITNESS (continued).—"Mr. Wise was apparently repeating a previous statement he had made to Mr. Peters—that he did not want the contract disclosed to anyone. He stated that very few people knew of it and he mentioned that he did not want Mr. Dobrzensky to know that Mr. Peters had seen the contract. That was the first time I learned about the contract. The next day I saw the photostatic copy of the contract. In a week or two I imparted knowledge of the contract to my clients." [67]

CROSS-EXAMINATION OF WITNESS CERINI.

"Mr. Wise in the conversation referred to the fact that there had been two other contracts, I believe. I saw a photostatic copy of the letter written by Mr. Owens to Mr. Wise which contained a detailed statement as to what had been done with the $40,000.00. I believe Mr. Resleure has a copy

(Testimony of Floyd B. Cerini.)

of that. I saw this letter about the same time I saw the contract of February 27, 1930. That was the first week in March, 1933."

Respondent here offered in evidence as their

Exhibit (B)

the letter last referred to. This letter is dated August 22, 1932, and is addressed to Roy T. Wise; the body of the letter reads:

"Referring to your letter of August 8, 1932, to Mr. Will H. Hays, copy of which was sent to me, I note your suggestion that neither you nor Mr. Diehl knew what disposition was made of the $40,000. obtained on the Westinghouse loan. You are no doubt familiar with this but to revise your memory I will give you some data and expenditures immediately following the receipt of the loan from Westinghouse:

Sept. 2, 1930—Roy T. Wise expenses	189.00
Sept. 3, 1930—Loan to Roy T. Wise	18,723.02
Sept. 13, 1930—Hays & Hays expenses paid	1,039.86
Sept. 13, 1930—Cushman, Bryant & Darby	2,967.18
Sept. 25, 1930—Purchase of 70 shares of this company's preferred stock which had been issued for cash advance	6,742.53
Sept. 25, 1930—Salary of S. A. Fletcher for Aug. and Sept.	1,000.00
Sept. 25, 1930—Payment of note for money advanced	4,029.80

(Testimony of F. W. Peters.)

Sept. 25, 1930—Hays & Hays services	3,250.00
Sept. 25, 1930—Clark, Nichols & Eltse	1,000.00
Nov. 24, 1930—Clark, Nichols & Eltse	1,031.20
Oct. 7, 1931—Cushman, Bryant & Darby	405.00
Oct. 7, 1930—Bank of America of Berkeley	250.00''

The above letter was signed by Mr. A. C. Owens.

The testimony of the witness, Cerini, here ended.

CROSS-EXAMINATION OF MR. PETERS.

"I believe my first visit to the home of Mr. Wise, which was located on Burnett Street, in Berkeley, was the [68] latter part of October or early November. I told him I represented the preferred shareholders, Charles E. Chapman, Professor Franklin C. Palm, Patrick H. McMahon, the Christensens, Theodore Harriman. Those are preferred shareholders who had not turned their stock in to the escrow with Mr. Woolsey in Berkeley. At that time I represented Franklin C. Palm, Patrick McMahon, Charles E. Chapman, Joseph J. Kearney, Soren Christensen, Henry Robb and Theodore Harriman. I did not represent Mr. Henderson. There was a Mr. Soren Christensen and two other members of that family. Professor Palm had power of attorney from all of these people to act for them, and he retained me. He took me down to see Mr. McMahon and Professor Chapman personally, and he communicated with the other shareholders and got their consent to my

(Testimony of F. W. Peters.)

acting for them. In talking with Mr. Palm he told me of the filing of an action by an attorney by the name of Waddell. I then went to San Francisco to the clerk's office, adjacent to this court room, and examined the records in that case. I read the complaint through. I did not take a copy of it. I have no recollection that that complaint recited that the existing contract between Hays, Wise and Diehl provided for the formation of a corporation named the Wise Patent and Development Company, which was to have 2500 shares of common stock. I did go to see Mr. Waddell personally, and it was for that reason I went over the complaint once, which is here in this court room, and then I went down to see him personally, and I have not looked at that complaint since. After I read this complaint and saw that it referred to the stock structure of the Wise Patent and Development Company, which company is referred to in one of these three contracts, I asked Mr. Palm as to how it [69] was they gained the knowledge which they incorporated in the complaint filed in November, 1931. Mr. Palm stated that he had no knowledge of the contracts that had been made among these three men. He stated that to me by saying that Mr. Waddell had been a director of these companies, and I believe an officer of one of them, and that it was for that reason that they had retained Mr. Waddell to handle this matter for them, and Mr. Waddell drew a complaint from his own knowledge, Mr. Palm signing it at Mr. Waddell's request. He did not say that he had verified the com-

(Testimony of F. W. Peters.)
plaint. He said he had signed the complaint, representing the stockholders."

There was here offered in evidence, as the

Respondent's Exhibit "C"

the files in Case No. 3114-S of the office of the Clerk of the United States District Court, Northern District of California. The complaint in said case was in substance as follows:

It was entitled in the above entitled Court. It named as plaintiffs, Franklin C. Palm, individually and as attorney in fact of Horace N. Henderson, Patrick H. McMahon, Charles E. Chapman, Josephine J. Carney and Soren Christensen, and Henrietta Huff. It named as defendants, A. M. Diehl, W. H. Hays, Roy T. Wise, and Wise Patent and Development Company. A summary of its allegations, except where quoted, follows:

Par. 1 alleged that plaintiff was a resident and citizen of the State of California.

Par. 2. That defendants Diehl and Wise are now residents of Pittsburg.

Par. 3. That Wise Patent and Development Company is a Delaware corporation, but that it is not qualified as a foreign corporation to do business in California.

Par. 4 and Par. 5. That Standard Die & Tool Com- [70] pany, Incorporated, and the Wise Manufacturing Company, are California corporations.

Par. 6. That W. H. Hays is a resident of Sullivan, Indiana.

Par. 7. That the capital stock of Standard Die & Tool Company was 700 shares of common stock and 300 shares of preferred, par value of each share being $100.00.

Par. 8. That the total capital stock of the Wise Manufacturing Company was 37,500 shares, without par value.

Par. 9. "That during all the times herein mentioned the plaintiff has been and now is the owner of 20 shares of said 8% preferred capital stock of said Standard Die & Tool Company, of the par value of $100.00 per share. That plaintiff, has been and now is the duly appointed attorney-in-fact of Horace N. Henderson, Patrick H. McMahon, Soren Christensen, Charles E. Chapman, Henrietta S. Huff and Josephine J. Carney, and that plaintiff by said appointment as said attorney-in-fact has been and now is authorized by the above named parties and each of them to bring this action for them and in their behalf, and in behalf of each of them. That the said parties during all the times herein mentioned have been and now are the owners of shares of said 8% preferred capital stock of said Standard Die & Tool Company as set forth as follows, to-wit: Patrick H. McMahon, 30 shares of the par value of $100.00 per share; Charles E. Chapman, 20 shares of the par value of $100.00 per share; Soren Christensen, 30 shares of the par value of $100.00 per share; Horace N. Henderson, 5 shares of the par value of $100.00 per share; Hen-

rietta S. Huff, 5 shares of the par value of $100.00 per share; Josephine J. Carney, 10 shares of the par value of $100.00 per share."

Par. 10. "That on or about the 1st day of August, 1929, the stockholders of said Standard Die & Tool Company, voted to transfer the assets, business and liabilities of said Standard Die & Tool Company, to said Wise Manufacturing Company. That at said time, the said common stockholders of said Wise Manufacturing Company were also the said common stockholders of said Standard Die & Tool Company and said common stockholders by reason of their said holdings of the common capital stock in each of the said corporations, owned and controlled each and both thereof. That at said time more than one-half of the said common capital stock of said Standard Die & Tool Company and of said Wise Manufacturing Company, was owned by the defendant, Roy T. Wise."

Par. 11. "That pursuant to said vote of said stockholders of said Standard Die & Tool Company, the assets and business of said Standard Die & Tool Company were conveyed and transferred to said Wise Manufacturing Company on or about August 1st., 1929. That among the assets of said Standard Die & Tool Company so transferred and conveyed as aforesaid, were certain United States patents upon a multi-speed transmission, which said patents had been issued to the defendant, Roy T. Wise, [71] under Letters Patent issued by the United States Patent Office. That prior to the said transfer of assets by said Standard Die &

Tool Company to said Wise Manufacturing Company on August 1st., 1929, said Roy T. Wise had transferred to said Standard Die & Tool Company the said patents and each of them, and had received in exchange therefor the hereinabove mentioned shares of the common capital stock of said Standard Die & Tool Company, standing in his name. That the plaintiff is ignorant of the serial numbers and dates of issuance of part of said patents, but that two of said patents bore the following names, dates of issuance, and serial numbers, to-wit: Wise Constant Mesh Gear Transmission Clutch, United States Patent Serial No. 378,826 and dated July 17, 1929; and Wise Constant Mesh Transmission For Electric Motors, bearing United States Patent Serial No. 380,634, and dated July 24th., 1929."

Par. 12. "That said Horace N. Henderson, Patrick H. McMahon, Charles E. Chapman, Josephine J. Carney, Soren Christensen, Henrietta Huff, and plaintiff, had each purchased the respective numbers of shares of the said 8% preferred capital stock of said Standard Die & Tool Company as hereinabove set forth in Paragraph No. 9, upon the representations and statements of the defendant, Roy T. Wise, that the said patents and each of them herein referred to were and each of them was of great value, and that said Roy T. Wise by his said majority stock ownership of said Standard Die & Tool Company would make large and continuing profits from the manufacture and sale of the said patented devices. That said Roy T. Wise further represented to plaintiff and the stockholders in this paragraph

named, that the said transfer of the assets and business of said Standard Die & Tool Company to said Wise Manufacturing Company would greatly facilitate the said manufacture and sale of said patent devices, and would enhance the future profits to be derived from said continuing business. That the said stockholders in this paragraph named, and each of them, purchased the shares of stock herein enumerated in Paragraph 9 by reason of the reliance they and each of them placed in the said statements of said Roy T. Wise. That the said statements of said Roy T. Wise and each and all thereof were false, and were made by said Roy T. Wise with the intent and purpose of defrauding the above named stockholders and each of them."

Par. 13. "That on or about the 5th day of March, 1930, said Roy T. Wise by reason of his said control of the common capital stock of the said Wise Manufacturing Company, and by reason of his control of the common capital stock of the said Standard Die & Tool Company, caused the directors and officers thereof to transfer the said patents, and all the assets and business of said corporations, and each of them, to the Wise Patent & Development Company, a Delaware corporation. That the plaintiff is informed and believes and therefore states the fact to be that the capital stock of said Wise Patent & Development Company was and is divided into 1000 shares of preferred capital stock of the par value of $100.00 per share, and 2500 shares of common capital stock of no par value. That plaintiff is informed and believes and therefore states

the fact to be that all the said capital stock, of said Wise Patent & Development Company, except for approximately five qualifying shares, is owned share and share alike by the defendants, A. M. Diehl, W. H. Hays and [72] Roy T. Wise. That the defendants Wise Patent & Development Company, A. M. Diehl, and W. H. Hays, secured their respective interests in said patents, assets and business as hereinabove set forth with full knowledge of the representations made to said stockholders by said Roy T. Wise, and with full knowledge that the said transfer of said patents, assets and business was and is a fraud upon the rights of said preferred stockholders herein named. That the said stockholders herein named in Paragraph No. 9, have received, nothing for their shares of preferred capital stock, for which the sum of $100.00 per share was paid by them. That the common stockholders of said Wise Manufacturing Company have been paid the sum of $20.00 per share for their stock; and that the holders of the common capital stock, and of certain shares of the preferred capital stock of said Standard Die & Tool Company have received the par value of their said shares after said March 5th, 1930."

Par. 14. "That by the terms of the Articles of Incorporation of said Standard Die & Tool Company, it is provided as follows, to-wit:

"In the event of the liquidation or dissolution, whether voluntary or involuntary of this corporation, or the sale of all its assets; or in the event of its insolvency, the holders of the preferred stock shall be entitled to be paid in full both the unpaid

dividends accrued thereon, if any, and the par value of their respective shares before any amount shall be paid to the holders of the common stock; and the holders of the common stock shall be entitled to the remaining assets."

"Except as to matters and things hereinabove stated, no distinction shall exist between said classes of stock or owners thereof and no preference shall be granted nor shall any distinction be made between the classes of stock either as to voting power, or as to statutory or constitutional liability of the holders thereof to the creditors of this corporation."

Par. 15. "That the said transfer of the said patents, business, and assets of said Standard Die & Tool Company and said Wise Manufacturing Company dated on or about March 5th, 1930, was and is a fraud upon the preferred stockholders named in Paragraph 9 and upon plaintiff. That the proceeds of said transfer have been distributed contrary to and in violation of the Articles of Incorporation of said Standard Die & Tool Company and in fraud of the rights of stockholders of said company herein named. That the defendants A. M. Diehl, W. H. Hays and Wise Patent & Development Company were and are parties to said transactions and knowingly participated therein."

The complaint prayed that the defendants should be compelled to pay the plaintiffs the full par value of the stock or that the defendants Wise, Diehl and Hays should be required by the Court to cause the defendant Wise Patent and Development Company should retransfer the patents to the Standard Die

and Tool Company. The complaint prayed for general equitable relief, [73] and for costs. An affidavit was attached to the complaint, reading as follows:

"FRANKLIN C. PALM, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters that he believes it to be true.

FRANKLIN C. PALM."

This complaint was marked "Filed November 30, 1931."

In the same file was a stipulation, filed January 29, 1932, extending the time to plead of any such defendants as had been served to February 27, 1932. This stipulation was signed by George F. Sharp and James Waddell, as attorneys for the plaintiffs. The file showed another stipulation filed February 27, 1932, reciting that no default was to be taken, and that any such service on any of the defendants as had been made was abortive and that the defendants would not be required to appear unless they were legally served.

In the same file was a Notice of Substitution of Attorneys. It was entitled in the case, and it was signed by George F. Sharp and James Waddell, as the former attorneys for the plaintiffs, and by the said Frederick W. Peters as the substituted attorney. This notice was dated February 2, 1933, and it was filed February 6, 1933. The notice was addressed to Clark, Nichols & Eltse.

CROSS-EXAMINATION OF WITNESS PETERS (resumed).

"Mr. Waddell did not mention to me that he was the attorney for the petitioner, Mr. Olin, who recovered one of the judgments referred to in the petition in this case. I did not ask Mr. Waddell as to whether he had any information of any sort relative to the agreement that had been made among the three men, Wise, Hays and Diehl. I did not ask because at that time [74] I had no knowledge of any agreement. In fact, I asked Mr. Waddell if he knew what had happened to the patent and who owned it, and he said he did not. I read this complaint here over once, and I tried to get in touch with Mr. Waddell at least a half a dozen times after that, and he was always too busy to see me."

"Q. In the course of your conversation with Mr. Wise, in which he stated that the contracts had not been shown to anyone excepting—insofar as he knew —excepting those three people, and after Mr. Wise had made that statement to you, did you not put some question to Mr. Wise, 'How is it, Mr. Wise, that in November, 1931, Mr. Waddell was able to file a complaint reciting in substance the chief feature of this agreement between Wise and Diehl and Hays'?

A. I never mentioned the first complaint to Mr. Wise at any time except to tell him I knew it had been filed, and I did not think it was of any use.

Q. Now, you state that Mr. Wise let you have the minutes of this corporation, the Wise Manufacturing Company, and of the Standard Die & Tool

(Testimony of F. W. Peters.)

Company, and the books of these two corporations, for a period of two weeks?

A. Approximately, yes.

Q. Did you examine all of these records which he delivered to you and allowed you to keep for this period of time?

A. I did.

Q. You state, on your direct examination, that you read every resolution of the boards of directors of these two corporations through?

A. I believe I did." [75]

"I did not examine the ledgers and journals and ordinary accounts of the two companies to find what debts had been paid through Escrow 167 at the Bank of America. Mr. Wise gave to me a statement showing he received from the Wise Patent and Development Company $25,000.00, which he said was received for the sale of the patents, and that listed a long list of creditors which he said had been paid through this Escrow 167 at the Bank of America. I asked Mr. Wise for the books and correspondence, and he said there was too much there. He stated that he would give me what I asked for. That offer was not open after I had made a two weeks examination of the minutes for after having the books for two weeks, I took them back to him and asked him at that time for the correspondence with Will Hays, and he refused to give me the correspondence. He showed me one or two letters, he told me that he had given Hays a copy of every directors' meeting and stockhold-

(Testimony of F. W. Peters.)

ers' meeting of [76] the company, sending them east to Hays and corresponding with him. He showed me only one letter he had received from Alonzo Owens. He showed me that letter in answer to my inquiry as to what had happened to the $40,000.00. That letter accounted for the $40,-000.00. That letter is Respondent's Exhibit "B". They did renew the $40,000.00 note to the Westinghouse Company. He did not say to me that the note had been renewed for an amount which was the original amount less royalties, and that the royalties were less than $1000.00. He merely told me he had renewed the note under the pressure of the Westinghouse Company, and that they were going to refuse to renew the note any longer and were pressing Mr. Hays and Mr. Diehl."

"Q. Did he not also say this: that when they made the contract, they thought the returns from the royalties would be so great that it was understood between Westinghouse Company and these three men that one-half of the royalties would go to the Patent Company, the Wise Patent & Development Company, and the other half should be applied on the note? Didn't he say that?

A. He told me that was the original agreement, and he expected the royalties to pay off the note within two years.

Q. Didn't he say this to you, too: that the royalties had been so little that the Westinghouse Company had insisted that the whole of the royalties be applied on the note which was renewed?

(Testimony of F. W. Peters.)

A. He said they had been reduced, and because no—no payments had been made on the principal —and that they had insisted on the renewal of the note, and that all royalties be applied to the note.

Q. In other words, they were not prepared to pay off the note when its due date arrived, they got it renewed, and that Westinghouse Company insisted that all the [77] royalties that came in on this contract should be applied on that note?

A. Yes.

Q. And you left with that understanding and you never checked it or investigated, to determine whether there were any facts to the contrary?

A. I beg your pardon, I did. I asked Mr. Wise for a copy of the contract of Westinghouse, and I asked for the correspondence.

Q. I mean, from that time forward, you have rested content, as the representative of the Professor and these other people, with the idea that that note was lodged there and that it was being paid off only with such royalties as may come in due to the Wise Patent & Development Company?

A. No. I asked Mr. Wise about that the last time I saw him, and he told me that the Westinghouse Electric Company was pressing Mr. Hays for payment because they did not want to renew the note, and that is one of the reasons he did not want Mr. Hays to know I saw the contract, that Westinghouse was pressing Mr. Hays and Diehl for the payment of the note, and did not know

(Testimony of F. W. Peters.)
whether they would renew it the following September, when it fell due or not."

The cross-examination of the witness, Peters, continued as follows:

Mr. Clark next asked the witness if Mr. Palm had ever mentioned to him that Mr. Wise, early in 1931, had offered to the preferred stockholders to turn over to them everything he had received out of his stock, anything that was promised to him, that is out of this Wise Patent and Development Company, if they would simply consent to take it subject to the burden of the indebtedness unpaid to Owens. The witness replied that Palm never mentioned such a thing. [78]

The witness testified that he had never represented Mr. Palm at any other time than the Palm vs. Diehl suit mentioned in the testimony.

"Q. Did he state to you he had been invited to go to the Bank of America and deposit his stock and sign an agreement to a trust there created by Mr. Wise, wherein he agreed that—without stating exactly what the terms of the contract were—wherein Wise agreed he would hold everything coming to him under these contracts for the use and benefit of the preferred stockholders of the Standard Die & Tool Company?

A. No, Mr. Palm did not tell me anything about that, Mr. Clark. That was told by—I believe it was Mr. White—oh, yes, he told me that at some meeting in San Francisco in 1932, that Mr. Wise

(Testimony of F. W. Peters.)

had offered to put up his shares of the company in escrow with Mr. Woolsey. I think that is what we are talking about; and the preferred shareholders were to turn in their stock and release all rights they had against the Standard Die & Tool Company or against the Wise Manufacturing Company.

Q. Now, Mr. Palm told you that was proposed at a meeting at which he attended?

A. No, Mr. Waddell had gone over to represent them, and Mr. White had gone over, and Mr. McMahon had gone over, Mr. Eltse and Mr. Dobrzensky.

Q. Mr. Waddell is the gentleman with whom you conferred about the suit which had been filed in which the stockholders wanted to get this bonus, or whatever it might be called, that was to go to Wise, isn't that true?

A. No. They filed that suit, Mr. Waddell told me he figured from the complaint—just what he told me after I [79] read the complaint—that there was fraud involved in the transaction some place, that he did not know very many of the facts, but he did know the patent had been transferred out of the Wise Manufacturing Company, or had been assigned, and that he did not know what had been received for it.

Q. Then Waddell told you that when he drew that complaint he knew that fraud had been practiced upon the stockholders and everyone concerned in the Wise Manufacturing Company, did he?

(Testimony of F. W. Peters.)

A. No, he did not. He said that there was some fraud involved in the whole case, but he did not know for sure; in fact, he said he knew very little about the whole situation, even as a director of the company.

Q. Did he tell you that the fraud inhered in the making of that particular agreement which called for the creation of a corporation known as the Wise Patent & Development Company, in which the shares of stock were to be $2500, as recited in the Palm case?

A. He never mentioned that.

Q. You went to the bank also for the purpose of examining the records connected with this escrow?

A. No, I did not.

Q. You never talked then with anyone at the Bank of America?

A. I talked—I believe I called up the manager over at the bank and asked if I could have access to the escrow, and I was referred to Clark, Nichols & Eltse. Mr. Cerini then went over to see Mr. Eltse, and told him we were investigating in the matter, and asked merely if he could go over to the bank and examine the escrow, and Mr. Eltse said absolutely none of their records were open to us.

Q. Did anyone tell you that early in—that in March, 1931, Mr. Wise had tendered everything that he had obtained under this contract arrangement with Diehl and Hays—everything he had [80] obtained under it—to the Bank of America,

(Testimony of F. W. Peters.)

asking them to act as trustees for these preferred stockholders, so that they might have distributed to them everything that he had received out of that contract in proportion to the stock holding?

A. Never.

"Mr. CLARK.—Q. Of course, you were not very greatly surprised that the exact terms of this contract had not been broadcast?

A. I never heard of the contract until Mr. Wise showed it to me."

"I noticed the resolution in the minutes of the company, of December 31, 1929, reciting that the company was in distress and was being pressed by its creditors, and must execute a series of notes to about 15 creditors in order to get time, together with other things recited. I knew the company was indebted. Wise told me the condition of the company generally and that it was in distress in 1929, and that they had a great many outstanding creditors, and that he was trying to raise money to pay off the creditors. I did not know that following 1929 Wise contacted Hays and Diehl and tried to get them to advance $25,000.00 to meet the claims of the creditors, in fact Mr. Wise told me that he had gone to Los Angeles, and I believe there was a resolution in the minute book reciting that he had met Hays, I believe it was, in Los Angeles, and giving him authority to go east and raise $75,000.00."

(Testimony of F. W. Peters.)

The witness' attention was called to the minutes of the meeting of the directors of the Wise Manufacturing Company, of January 27, 1930, which were read by Mr. Clark. These minutes included the following:

"President Wise discussed conference with Mr. Will Hays on his trip to Los Angeles January 21st to 25th. During conferences Mr. Hays telephoned A. N. Diehl, Vice President of the Carnegie Steel Company of Pittsburgh and made a definite appointment for Mr. Wise to discuss the possibility of refinancing, License to Manufacture, or the probability [81] of outright sale. Mr. Will Hays is to act as our counsel in this matter—no definite plan having as yet been determined. At Mr. Will Hays' suggestion, Mr. Wise is to take 5 HP Westinghouse motor and transmission, together with pony brake, and demonstrate it to concerns as recommended by Mr. Hays.

Motion was made by Mrs. Wise, seconded by Mr. Olin, to give our attorney James E. Waddell authority to use his best judgment in the settlement of our account with the Kidelite Company of Lewiston, Idaho."

The witness then testified:

"I discussed in a general way the contents of these minutes with Mr. Wise. I was trying to find how Mr. Hays came into the picture."

(Testimony of F. W. Peters.)

"Q. And he came in right in the midst of this distress?

A. Yes."

Peters then testified in substance as follows: That he had noticed the resolution gotten up on March 10th, 1930, employing auditors to make up a full list of the debts of the concern, and he saw a list of the debts compiled which he (Wise) had presented to Mr. Van Dine.

The witness continued:

"I know that Mr. Van Dine had put a list of these debts with the bank. Mr. Wise told me that the money had been paid out by Clark, Nichols & Eltse to this list of creditors. I noticed that Mr. E. W. Olin had been elected Secretary-Treasurer of this company. I know he was one of the directors."

Peters next testified that he had read the minutes of the meeting of March 10th, 1930, and when questioned as to whether he had noticed therein a waiver of notice of meeting of directors to be held April 11th, replied that he had noticed in the minutes quite a few of those waivers. He admitted that he had no difficulty in finding out that Hays and Diehl were the men with whom Wise was dealing after reading those minutes. He also stated

(Testimony of F. W. Peters.)

that Mr. Olin, who signed the minutes as secretary at page 25 of the minutes of the Wise Manufacturing Company [82] as secretary, is one of the petitioning creditors.

The minutes of April 11, 1930, from page 25 of the minute book, were here read, as follows:

"Director Pansey E. Wise read a letter received from Mr. Roy T. Wise, President of this Company, wherein Mr. Wise requested authorization to negotiate in the name, and for the benefit of the corporation, a loan of $25,000 the said sum to be used to satisfy current claims of creditors of this corporation pending sale of corporate assets to Messrs. A. N. Diehl, Will Hays, et al.

It appears from Mr. Wise's letter that some time might elapse before the validation and check-up of patents of The Wise Manufacturing Company involved in the sale.

A resolution was passed, a copy of which is attached hereto and made a part hereof, authorizing the President and Secretary in the name of the Corporation and under the corporate seal to execute a promissory note in the principal sum of $25,000, bearing interest at the rate of not to exceed 8% per annum.

There being no other business before the meeting, the same was on motion made, seconded and carried declared duly adjourned.

ROY T. WISE E. W. OLIN

President Secretary"

(Testimony of F. W. Peters.)

The witness continued:

"I remember reading that resolution, and that raised a question in my mind as to where Alonzo Owens came in, and I went down and talked with Mr. Wise about that resolution. I believe Mr. Wise executed the $25,000.00 note at the time mentioned in the resolution, and sent through the resolution or requested them to pass it for him. I do not remember Wise telling me that Hays let Wise on his mere promise have $25,000.00 or substantially that sum before they fixed the papers up. In fact, he told me Mr. Hays was not involved in this when I first went down to see him. It was almost a month and a half before I found out that the $25,000.00 advanced by Owens was really the money advanced by Hays. Mr. Wise had tried to conceal the fact that Hays had advanced the $25,000.00."

"Q. But you did afterwards ascertain the fact that A. C. Owens was simply an attorney in Mr. Hays' office, and in whose name a deed of trust was given?

A. I cannot say that, because when I asked Mr. Wise about the foreclosure of the mortgage he said that that promissory note was still in Mr. Owens' name, and Mr. Owens had foreclosed the mortgage, and he had written to Mr. Hays protesting about it, and that the money was Mr. Owens, and he held the mortgage; and so I am not sure still in my own mind exactly how that was——"

"In my examination of the minutes I believe I noticed the resolution of the Wise Manufacturing Company of May 26, 1930."

The resolution of that date was here read, it being [83] the resolution authorizing the borrowing of $25,000.00 which resolution is Petitioners' Exhibit 2.

Thereupon the following occurred:

Q. Did you also, in checking the records of this corporation, encounter a resolution of May 5, 1931, authorizing the Standard Die & Tool Company to transfer the patents to the Wise Patent & Development Company?

A. I do not know, Mr. Clark. I know there was something to that effect, but I do not remember what it was. You will have to refresh my memory. I do know there was some such resolution, and it was not adopted by all of the directors. I think there was some resolution merely passed by Mr. Wise and Mrs. Wise as being the only directors present.

Mr. RESLEURE.—There is such a resolution, and I submit it should go into evidence.

The witness here identified a certain Minute Book of the Standard Die & Tool Company as containing the minutes of the meeting of the directors of said company held May 5, 1930. These minutes showed that Mrs. Wise and Mr. Olin were present at the meeting. The minutes also showed that Roy T. Wise had signed the minutes of the meeting. The minutes showed the adoption of the following resolution:

"BE IT RESOLVED: That the Board of Directors of the Standard Die and Tool Company, Inc., sell, assign and transfer to the Wise Patent and Development Company, its successors, assigns and legal representatives, all those certain patents and applications described as follows:

Patent 1,745,075, granted January 28, 1930, to Roy T. Wise, for Improvements in Three-Speed Transmission;

Appln. of Roy T. Wise for Letters Patent of the United States for Certain new and useful improvements in Constant Mesh Gear Electric Motor, Serial No. 283,248, Filed June 6, 1928; [84]

Appln. of Roy T. Wise for Letters Patent of the United States for certain new and useful improvements in Two-speed Transmission—Serial No. 283,247, Filed June 6, 1928;

Appln. of Roy T. Wise for Letters Patent of the United States for certain new and useful improvements in Transmission Clutch, Serial No. 296,659, filed August 1, 1928;

Appln. of Alfred Wasbauer for Letters Patent of the United States for certain new and useful improvements in Three-speed Constant Mesh Gear Electric Motor Transmission—filed January 4, 1928 —Serial No. 244,434.

AND BE IT FURTHER RESOLVED: That this corporation does hereby authorize and request the Commissioner of Patents to issue the Letters Patent to issue upon the said pending applications

to the said assignee and that this corporation execute any and all further papers requested by said assignee, its successors, assigns and legal representatives, to fully sell, transfer and assign, without further remuneration to this corporation, any and all applications filed or patents granted for said inventions in countries other than the United States to the end that title thereto shall be fully perfected in said assignee.

AND BE IT FURTHER RESOLVED: That the Secretary of this corporation execute such an assignment as authorized by this foregoing Resolution and that upon the execution of the same and as a part of the execution thereof, she affix the corporate seal thereto."

There was here placed in evidence, as

Respondent's Exhibit "D"

a contract dated May 8, 1930, signed by Roy T. Wise, as first party, and Ambrose N. Diehl and Will Hays, as second party. This contract read as follows: [85]

SUPPLEMENTARY AGREEMENT.

THIS SUPPLEMENTARY AGREEMENT, made and entered into this eighth day of May, 1930, by and between Roy T. Wise, of Berkeley, California, party of the first part, and Ambrose N. Diehl, of Pittsburgh, Pennsylvania, and Will H. Hays, of Sullivan, Indiana, parties of the second part, witnesseth that,

WHEREAS, the parties hereto did, under date of February 27, 1930, enter into a certain written agreement, relative to certain inventions and patents, and certain applications for patents for applying various transmission speeds to induction motors, and

WHEREAS, by said agreement of February 27, 1930, it was contemplated that a corporation would be formed under the laws of the State of Delaware, to be known as the Wise Patent and Development Company, with a capitalization of 1200 no par value shares of common stock, and

WHEREAS, since said date and the making of said contract the parties have mutually agreed to change the authorized capital of said corporation and a corporation pursuant to such mutual agreement has been organized under the laws of the State of Delaware in the name of Wise Patent and Development Company, with a capitalization of 2500 no par value common shares and 1000 shares of preferred stock of a par value $100.00 per share, and

WHEREAS, it is the mutual desire of the parties hereto that said contract of February 27, 1930, be supplemented and modified as herein provided,

NOW, THEREFORE, in consideration of the mutuality hereof and the sum of one ($1.00) dollar, each to the other paid and for other valuable and sufficient considerations, the receipt of all of which is hereby acknowledged, it is agreed by and between the parties hereto as follows: [86]

A. That Item 2 of said contract of February 27, 1930, be and the same is modified to read as follows:

That the capital stock of the said Wise Patent and Development Company shall consist of 3500 shares, of which 1000 shares of the par value of $100.00 each, amounting in the aggregate to $100,000.00, shall be preferred stock, and of which 2500 shares without par value shall be common stock, of the common stock 1500 shares shall be issued as follows: 25 shares shall be first issued to the five directors of said corporation and later acquired by the parties hereto and reissued 8⅓ shares to Roy T. Wise; 8⅓ shares to Ambrose N. Diehl; and 8⅓ shares to Will H. Hays, 458⅓ shares shall be issued to Roy T. Wise and by him assigned to Ambrose N. Diehl; 458⅓ shares shall be issued to Roy T. Wise and by him assigned to Will H. Hays; 458⅓ shares shall be issued to Roy T. Wise, and 100 shares shall be issued to Roy T. Wise to be used by the party of the first part in the complete discharge and release of the said party of the first part and said patents, applications and rights from any and all claims, if any, against said party of the first part, or his assignees, or the said Wise Patent and Development Company, or the Standard Die and Tool Company, Incorporated, or the Wise Manufacturing Company, by B. K. Gillespie of Los Angeles, California, and Owen B. Smith, of Oakland, California, or either of them, provided, however, [87] that such 100 shares so to be issued for

such purpose to the party of the first part shall be so used by him as that the voting right in such 100 shares remains in the party of the first part and the parties of the second part jointly for a period of two years from the date of issue, it being understood that while there is no legal claim against the party of the first part by the said B. K. Gillespie and the said Owen B. Smith, the party of the first part desires to reward them for certain services heretofore rendered by them in indirect relation to this transaction. It is understood that all of such 1475 shares of common stock shall be issued fully paid and non-assessable in exchange for such assignments of such patents, applications and rights, all as herein provided for which said party of the first part undertakes to cause and has caused to be assigned.

B. The party of the first part hereby acknowledges receipt of six hundred fifty ($650.00) dollars, provided to be paid in item 5 of the agreement of February 27, 1930, such sum having been advanced by the parties of the second part herein for the account of Wise Patent and Development Company as a loan.

C. The parties of the second part have heretofore made advancements to the party of the first part for the account of the Wise Patent and Development Company and the parties of the second part shall be entitled to reimbursement of any sums so paid before the party of the first part shall be entitled to any portion of the seventy-five thou-

sand ($75,000.00) dollars provided for in Item 7 of the agreement of February 27, 1930. [88]

D. The parties hereto further agree that they will cooperate to the end that the Wise Patent and Development Company will issue and sell the 1000 shares of Preferred Stock in the Wise Patent and Development Company at and for the price of $95.00 per share and issue and sell the remaining 1000 shares of no par value common stock in said Company at $5.00 per share, along with such Preferred Stock, and that 250 shares of such Preferred and Common Stock be sold immediately and the remainder thereof sold at such time as the President of said company shall deem necessary, and that from the proceeds of the sale of said stock the Wise Patent and Development Company shall loan to the party of the first part herein a sum not exceeding Seventy-Five Thousand ($75,000.00) Dollars from time to time, taking his promissory note, or notes, therefor to the satisfaction of the parties of the second part and said Wise Patent and Development Company, and assign as collateral security for such note or notes the stock owned and/or controlled by the party of the first part in the Standard Die and Tool Company, Incorporated, and the Wise Manufacturing Company, both California corporations, and will further cause to be pledged by said California corporations all of their assets of whatsoever kind or nature and in such form and manner as is satisfactory to the parties of the second part herein and to the Wise Patent and Development Company and will assign and deliver and transfer to the Wise

Patent and Development Company all of his stock in said Wise Patent and Development Company for further assurance as collateral and as security for such loan.

The party of the first part agrees that in the event of making of such loan by the Wise Patent and Develop- [89] ment Company he will use the funds derived therefrom in the retirement of obligations and in the purchase of stock owned by others in the said California corporations and furnish the parties of the second part of evidence of such application of funds. It is mutually understood between the parties that such loan is subject to appropriate approval and corporate action by the Wise Patent and Development Company and that said company could not loan money except in its direct relation to the acquiring of property rights from the party of the first part and the said California corporations, and in connection with such advancements and loans so made.

The advancement or loan of said $75,000.00 or any part thereof by the Wise Patent and Development Company shall in no event be considered as payment or part payment of the $75,000.00 mentioned in said contract of February 27, 1930, and the party of the first part herein shall not be entitled to any portion of the $75,000.00 mentioned in said contract except, when, as and if, the sum is available from surplus accumulated over the expense of operating the Wise Patent and Development Company, as provided in said contract of February 27, 1930, and it is agreed that Preferred

Stock Dividends shall constitute a part of expense of operating said company.

It is understood between the parties that the party of the first part may need a substantial portion of the said sum of $75,000.00, which he is requesting the Wise Patent and Development Company to loan him and the party of the first part obligates himself to secure as fully as possible the advancement [90] of said sum of $75,000.00, or any part thereof, and cause the Standard Die and Tool Company, Incorporated, and the Wise Manufacturing Company, in which companies the party of the first part owns the controlling interest, to execute such document or documents as will afford the greatest security for such loan in view of the fact that the funds so requested are to be used by the party of the first part incident to his acquiring stock in said California Companies and in payment of obligations of said companies, and the undersigned further represents that he will transfer and assign the stock in said California corporations and the said stock in the Wise Patent and Development Company as security for such sum or sums so advanced.

E. The party of the first part agrees to protect the validity of the patent and applications for patents against all claimants and against infringement. Should it appear advisable to acquire a patent or patents having damaging claims the party of the first part agrees to procure such patent or patents and to cause them to be duly assigned to the Wise Patent and Development Company.

IN WITNESS WHEREOF the parties hereto have executed this agreement in triplicate on the day and year first above written.

Roy T. Wise
Party of the First Part
A. N. Diehl
Will H. Hays
Parties of the Second Part [91]

The respondent next offered and it was received in evidence as the

Respondent's Exhibit "E"

a contract dated September 1, 1930. This contract read as follows: [92]

This Agreement, made and entered into this first day of September, 1930, by and between Roy T. Wise of Berkeley, California, hereinafter called First Party, and Ambrose N. Diehl of Pittsburgh, Pennsylvania, and Will H. Hays, of Sullivan, Indiana, hereinafter called Second Parties, WITNESSETH that:

WHEREAS, under date of February 27, 1930, an agreement was entered into between the parties hereto relating to the Wise Multi-Speed Transmission and matters relating thereto, and

WHEREAS, under date of May 8, 1930, a supplemental agreement was made between the parties hereto which modified said agreement of February 27, 1930, and

WHEREAS, since the execution of said agreements matters have arisen which vitally affect the situation relating particularly to the amounts which the parties then anticipated would be received from a licensee with whom negotiations were then in progress and the parties hereto recognize that by reason of the changed conditions said contracts above referred to should be modified;

NOW, THEREFORE, in consideration of the sum of One Dollar ($1.00) in hand paid by the Second Parties to the First Party and all other valuable and sufficient considerations, receipt of all of which is hereby acknowledged by the First Party, it is agreed by and between the parties hereto as follows:

1. That the part of said agreement of February 27, 1930, and of the supplemental agreement of May 8, 1930, providing for the payment to the First Party or to the Wise Manufacturing Company, a corporation of the State of [93] California, shall be set aside, cancelled and held for naught and the Second Parties herein and the Wise Patent and Development Company, a Delaware corporation, shall be under no obligation to pay to the First Party or to the said Wise Manufacturing Company or to the Standard Die and Tool Company, Inc., the said sum of Seventy-Five Thousand Dollars ($75,000.00) or any part thereof, but that the First Party herein shall receive in lieu thereof the consideration set forth in Item 2 of this agreement.

2. A contract was made between the Westinghouse Electric & Manufacturing Company of East

Pittsburgh, Pennsylvania, a Pennsylvania corporation, and Wise Patent and Development Company of New York, a Delaware corporation, under date of August 30, 1930, under the provisions of which the Westinghouse Electric & Manufacturing Company paid to the Wise Patent and Development Company the sum of Ten Thousand Dollars ($10,000.00) and said Westinghouse Electric & Manufacturing Company was given the right under the provisions of said contract to acquire an exclusive license, all as fully set forth in said contract, upon the payment of an additional sum not to exceed Twenty-Five Thousand Dollars ($25,000.00). The parties hereto agree that they are familiar with the provisions of said contract of August 30, 1930, between the Westinghouse Electric & Manufacturing Company and the Wise Patent and Development Company and are familiar with the terms and provisions thereof, and that reference thereto shall be fully made for the further identity of the sum of Ten Thousand Dollars ($10,000.00) and the sum of Twenty-five Thousand Dollars ($25,000.00) herein mentioned. The parties agree that the First Party herein shall receive [94] the sum of Ten Thousand Dollars ($10,000.00) paid by Westinghouse Electric & Manufacturing Company and that if said last mentioned company shall pay all or any portion of the sum of Twenty-five Thousand Dollars ($25,000.00) above referred to that the First Party herein shall receive any such sum or sums so paid. Provided, however, the payment of said sums to the First Party shall be by credit

to him on any sums owing by him to the Second Parties or to said Wise Patent and Development Company or to Alonzo C. Owens, of Sullivan, Indiana, but that such credits shall not be given until such a time or times as payments would have been due to the First Party under said contract of February 27, 1930, and the supplemental contract of May 8, 1930, had this agreement not been made, and until the liability of the parties hereto respectively has terminated on a note of Forty Thousand Dollars ($40,000.00) given to the Westinghouse Electric & Manufacturing Company on August 30, 1930, by the Wise Patent and Development Company and endorsed by the parties hereto respectively.

3. The parties hereto further agree that the Wise Patent and Development Company shall be under no obligation to sell any additional preferred or common stock under the provisions of the supplemental agreement of May 8, 1930, and that the Wise Patent and Development Company may use any earnings or any net income or any funds received by it in repayment of any loans extended by the Wise Patent and Development Company, or for its account, or in the retirement of preferred stock of the Wise Patent and Development Company and in payments of dividends thereon. [95]

4. The Second Parties shall not be obligated except in their sole discretion to advance funds or to cause the Wise Patent and Development Company to advance funds to enable the First Party to acquire stock owned by others than himself and

his wife in the Standard Die and Tool Company, Inc., and in the Wise Manufacturing Company, both California companies. However, the Second Parties may, in their discretion, take advantage of all or any part of certain options now outstanding on stock in said companies.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in triplicate the day and year first above written.

Roy T. Wise
First Party.
A. N. Diehl
Will H. Hays
Second Parties. [96]

THE WITNESS PETERS CONTINUED:

"I ascertained that the real property of the Wise Manufacturing Company was subject to a first deed of trust for something like $18,000.00 which covered its real property." Peters testified that he had not learned that the deed of trust had been foreclosed and he further testified that the company had no assets whatever other than these patents. In answer to a direct question by Mr. Clark inquiring if in checking the records of the Wise Manufacturing Company, the witness had encountered the minutes which related to the raising of from $5000.00 to $7000.00 upon the personal property which had been mortgaged to A. C. Owens, the witness replied that Mr. Wise had said that Owens had given him permission to sell a lathe or raise money on it because at that time the equipment was worth ap-

(Testimony of F. W. Peters.)

proximately $60,000.00 and there was only $25,-000.00 against it.

Q. Mr. Wise also told you, did he not, that there was in the files the consent of A. C. Owens for the company to raise on these mortgaged assets the sum of $5000.00?

A. No, I do not remember anything about that.

Q. I beg your pardon?

A. I remember nothing about that.

Q. Well, you read this resolution here dated in January, 1931, didn't you?

A. That was that lathe they had permission to sell.

Q. Read the whole resolution and tell me if you did not discuss it with Mr. Wise. Note the provision in there about borrowing $5000.00.

A. No. The only thing mentioned about this was he had permission to sell this lathe, and nothing said about the $5000.00.

Q. You read this resolution as a part of your investigation? [97]

A. Yes.

Q. And saw it there?

A. Yes.

Mr. Clark. I will read that resolution:

'On motion duly made and seconded, the following resolution was unanimously adopted.'

(Resolution read.)

Now, you say you did read that?

A. I probably did.

(Testimony of F. W. Peters.)

Q. And didn't Mr. Wise tell you that at that very time Mr. Owens had agreed, at the direction of Hays, that they could take the property on which he had the $25,000.00 mortgage and subject it to a first mortgage for the purpose of raising the $5000.00?

A. Never mentioned it."

The resolution which was read as indicated in the foregoing testimony recited that the Wise Manufacturing Company and the Standard Die and Tool Company should raise approximately $7500.00 by selling certain of its assets for the approximate sum of $2000.00 and by borrowing approximately $5000.00 on its personal property, all for the purpose of raising funds to retire existing indebtedness, and that the vice president and secretary should be authorized to sell the Acme Turret Lathe for $2000.00, and to obtain a loan for the corporation and borrow the sum of $5000.00, and that the vice president and secretary be authorized to execute such notes and chattel mortgages as might be necessary, and that the rate of interest to be paid should not exceed 12%. This resolution, as it appears in the minutes of the Wise Manufacturing Company, at page 28, was certified to by a certificate signed by the secretary, E. W. Olin.

In answer to a question by Mr. Clerk inquiring whether the witness had gone to Mr. Woolsey to

(Testimony of F. W. Peters.)
check up and find out whether it had been arranged that he would act as trustee to [98] take everything that Wise obtained out of these contracts to hold for the stockholders, the witness replied in the negative, stating that Mr. Wise had showed him a copy of that escrow and that it was not everything, that it only pledged what he was to derive from the stock and that he told the witness at the time that the stock was pledged to Mr. Hays and if Mr. Hays foreclosed the stockholders would have absolutely nothing.

"Q. I think you have sized it up correctly. You found out that the stock that came to the Wise Patent & Development Company had been pledged for a period of over two years?

A. Immediately when the money was advanced to Mr. Wise to buy up the stock through the escrow.

Q. And you distinctly understood it was that stock that Mr. Wise was willing to turn over to the preferred stockholders if they took it, subject to the pledge, and if they took it in proportion to their interest in the corporation?

A. Not to turn it over. He merely agreed to let them have the returns from the stock, but not the stock; and furthermore, at that time he told me that Mr. Hays—he disagreed with Mr. Hays about the sale of these chattels, and he said he could have sold them for twenty-five or thirty thousand dollars himself; and he asked me to have my stockholders

(Testimony of F. W. Peters.)

come in on that plan, and I told him, no, because if Mr. Hays foreclosed then all of the stockholders were out, and neither their creditors nor stockholders would have anything.

Q. So you, representing the stockholders, did not agree that the stock received from the Wise Patent & Development Company shall be treated as an asset of the two California corporations?

A. The stock, yes; but not the income from the stock. There is no telling what that is going to be. Mr. Wise wants to retain the stock, and merely give the shareholders the [99] proceeds of the surplus which comes in as dividends on this stock. He never offered to turn the stock over.

"Q. You never read the document he delivered to the Bank of America at all?

A. I read the one he showed me, which he gave Mr. Woolsey. The Bank of America refused to handle the escrow.

Q. Did he tell you the document he tendered to Mr. Woolsey was the same one he tendered to the Bank of America?

A. That I do not know, whether it was the same one or not. He only showed me one escrow, and it was signed by—represented $20,000.00 of preferred stock."

REDIRECT EXAMINATION.

The witness testified that he knew that some of the preferred stock had been purchased.

"Mr. Wise told me that when he was east he believed that the common stock was the only stock

(Testimony of F. W. Peters.)

that had a voting right, and that in order to get some of the common stock from the stockholders holding both common and preferred stock and refusing to sell the common stock unless their preferred stock was also taken up they had in some instances to purchase also the preferred stock through the escrow. All the common stock was paid for. A few shares of the preferred stock had been bought up from those people who owned common also. All the rest of the stock was just in escrow, and it had not been paid for, and the stock I represent has not been paid for and it is still outstanding."

"Q. You heard Mr. Clark read from that complaint in the case brought by Mr. Waddell, and make reference, in one of his questions, to the statement there—to a statement that the contract of February—the terms of the contract of February 27, 1930—were set forth in that complaint? [100]

A. I heard him say that.

Q. Have you read that—that complaint that you read in court contains such a reference?

A. No such reference whatsoever.

Q. Have you examined the complaint which Mr. Clark was reading from today?

A. I have; I just examined it.

Q. In the recess. Does it say anything about the contract of February 27, 1930?

A. There is no mention of any contract in the complaint.

(Testimony of F. W. Peters.)

Q. Does it show any knowledge on the part of Mr. Waddell of the contents of that contract?

A. None whatsoever. The gist of this cause of action is that the resolution of March 5, 1930, authorizing assignments of the patent to the Wise Patent & Development Company, and that Mr. Waddell says, 'on information and belief', he believes to be fraud; and there is no mention in here of any of the contracts entered into by Mr. Wise."

"Referring to the resolution of May 5th, 1930, and that is the one of the assignment of patents which has been read in evidence, of the Standard Die & Tool Company, I had a discussion with Mr. Wise concerning the consideration for the patent. I asked Mr. Wise for the assignment and he got the assignments out and he let me read them over. There were two of them, one from the Standard Die and Tool Company and one from Roy T. Wise personally. They recited a consideration of $1.00 and I asked him then what the consideration was he had received, and he told me that Mr. Eltse had told him that the only flaw in the whole deal was the fact that no consideration had been received by the Wise Manufacturing Company from the Wise Patent and Development Company back east, and I asked him then about his originally telling me that the [101] consideration was $25,000.00. I did not know differently until I saw the contract which showed that there was no consideration received by the western companies out here for that patent."

(Testimony of F. W. Peters.)

RECROSS EXAMINATION.

Mr. CLARK.—Q. Well, now, you are stating what that shows. Have you read recently the three contracts taken together?

A. No, I have only seen the first and the last contract.

Q. Well, you appreciate the rule of law that written contracts made essentially at the same time and as a part of the same transaction are to be read together?

A. These are five months, six months, or seven months, apart.

Q. Is your statement here based upon your consideration and as it is confined exclusively to the contract of February, 1930?

Mr. RESLEURE.—Objected to as argumentative.

Mr. CLARK.—He has given a conclusion.

The COURT.—Overruled. I understand the witness is giving us a conclusion about the contract.

Mr. RESLEURE.—Objected to as indefinite.

Mr. CLARK.—Q. There was no consideration for the transfer of the patents?

A. That is not my conclusion. That is Mr. Eltse's conclusion. Mr. Wise told me Mr. Eltse, the attorney for the Wise Manufacturing Company, had told him that was the only flaw, the fact there was no consideration for the transfer of the patent.

"Q. You, of course, as soon as you read the three contracts, understood it and you saw that it

(Testimony of F. W. Peters.)

was a part [102] of the three contracts, a sum of money was going to be advanced to take care of debts and to buy up outstanding stock in the California company?

A. Nothing said about debts, only going to put up $18,000.00 to buy the stock of the Wise Manufacturing Company, and that the Wise Manufacturing Company was then to get $75,000.00 after Mr. Wise owned all of the stock.

The COURT.—Q. You are speaking now of the contract of February 26th?

A. Yes, that is the contract of February 26th; and the contract recited——

Q. (interrupting). You notice that I am—It is in the contract some place—You notice in the contract the statement that these advances were to be made for two purposes: to clear up all of the indebtedness of the California corporations, and to buy up the stock in the California corporations?

A. No, only—the only advance for the indebtedness was the chattel mortgage on the property.

Q. And that was provided for in these instruments?

A. Not to my knowledge.

The COURT.—They speak for themselves. The question was raised by this witness: he said they showed him no consideration, or, rather, Mr. Eltse told Mr. Wise there was no consideration, as I understand it.

The WITNESS.—Yes; Mr. Eltse told him that was the flaw in the deal.

(Testimony of F. W. Peters.)

Mr. CLARK.—Q. In your checking up of the affairs of the two California companies, you found that the machinery and equipment had been sold out under this $35,000 deed of trust and chattel mortgage—the second deed of trust—had been sold out about the middle of the year 1931? [103]

A. No, it was not. My understanding was, from Mr. Wise, it was still then in the process of being sold out when I talked to him last year.

Q. I am not speaking of the odds and ends; I am speaking of what was put in the chattel mortgage—the $25,000 chattel mortgage. Did you ascertain, in your investigation in the middle of the year 1931, that the sale had occurred under the—what we call Owens' second deed of trust and chattel mortgage?

A. Only that Mr. Wise told me they had foreclosed and were selling the tools out, and that——

Q. (interrupting). I am not referring to the selling out by Owens after the purchase. I am referring to the foreclosure of the second deed of trust with chattel mortgage provisions on the personal property.

A. All I know is what Mr. Wise told me, and that is that the tools were being sold out by some man in Berkeley representing Mr. Hays, and at that time he was very much excited because he said the tools were worth at least $30,000, and they had only received $12,000 for the tools."

DOUGLAS F. SCOTT

was here called as a witness in behalf of petitioners, and after being duly sworn he testified:

DIRECT EXAMINATION.

"I live in Berkeley and I am trust officer of the First Berkeley Branch, Bank of America, in Berkeley. I had charge of Escrow No. 167. I was [104] operating under instructions from Mr. Wise and from the firm of Clark, Nichols & Eltse. On approximately the 27th day of May, 1930, we received $25,000.00 from Mr. Hays. This was sent in a letter from Mr. Hays dated May 16, 1930. The check was for $25,000.00 made by the Wise Patent and Development Company and was made payable to our order, drawn on Guaranty Trust Company, of New York. Our instructions were that the proceeds of that money were to pay certain accounts and notes payable as per a statement furnished us by Charles E. Van Dyne, a certified public accountant. Most of that money was used for that purpose, all except a few dollars. The next money to come into escrow was a check for $1600.00 which was received from Mr. Hays under a letter dated June 9, 1930, and the check was made in favor of us for the purpose of paying $600.00 for the stock of William Roberts and $1000.00 to be paid for the stock of Mr. H. G. White. The next payment received by us was the check for $16,623.02 of the Wise Patent and Development Company sent by Hays under his letter of September 2, 1930. We were instructed to use that money for the purpose of paying or exercising

(Testimony of Douglas F. Scott.)

options for certain common stocks as per statements furnished us by Mr. Hays. The common stock of the Standard Die and Tool Company and of the Wise Manufacturing Company. The payments totalled $60,623.02. On September 11, 1930, we received $1100.00 from Clark, Nichols & Eltse in the form of a check, together with a letter of instructions that the proceeds of that check were to be used to take up certain shares of preferred stock of Standard Die and Tool Company—10 shares belonging to Dubendorf and one share belonging to Wilke. The letter of instructions above referred to recited that the exercise of these options is in addition to the exercise [105] of the option set forth in the letter of Will H. Hays to your company under date of October 2, 1930. The next item received by us was a check from Clark, Nichols & Eltse on September 13, 1930, for $1000.00 together with a letter of instructions as follows: "We hand you herewith our check for $1000.00 to take up ten shares of preferred stock of John Jewett Earle. You are further instructed at this time to forward to Will H. Hays all preferred stock deposited in the escrow belonging to Mr. Earle, Mr. and Mrs. Dubendorf, and Fred H. Wilke totaling 21 shares." The only other money received by us was an item of $250.00 paid by the Wise Patent and Development Company covering the fees to the bank. The first correspondence we had in connection with the escrow in arranging the agreement was a letter from Mr. Ralph R. Eltse dated March 11, 1930. This letter

(Testimony of Douglas F. Scott.)

of March 11, 1930, was received in evidence as Petitioners' Exhibit No. 7. In substance it directed the action of the bank in paying out the moneys which it received to the creditors and to the stockholders. It contained the statement 'We solicit confidence as to all matters contained in this letter.' The letter was signed by Ralph R. Eltse.

Q. Referring to the last statement in the letter, "We solicit confidence as to all matters contained in this letter"; that came to your attention, did it?

A. It did.

Q. And you observed confidence in regard to that escrow?

A. We did.

Q. Told nobody about any of the matters contained in it, did you?

A. At the time we were disbursing the money, we did not have any questions asked us other than what came through the firm of attorneys.

Q. And you refused to give them any information?

A. I mean the firm of Clark, Nichols & Eltse.

Q. As a matter of fact, you gave no information concerning this escrow other than to the firm of Clark, Nichols & Eltse?

Mr. CLARK.—I will admit Mr. Sorrick told Mr. Eltse,—asked if he could pass out the information as to any terms of the contract—in the first place, he did not have any contract at the time—the terms of the contract—Mr. Sorrick told Mr. Eltse, and Mr. Eltse stated that it was one of the conditions of

(Testimony of Douglas F. Scott.)

[106] this payoff, as provided with this cash, that the terms of the contract and the parties were not to be discussed.

CROSS-EXAMINATION
OF DOUGLAS SCOTT.

"I do not remember any direct questions by the preferred stockholders who were getting money from the escrow as to what the terms of the contract were under which Mr. Hays was providing that money, and I have no knowledge as to Mr. Sorrick having been interviewed on that subject.

"I remember that in April, 1931, there was tendered to the bank a declaration of trust, executed by Roy T. Wise. I have a letter with me, dated April 3, 1931, sent by Clark, Nichols & Eltse. At that time there had been grumbling by the preferred stockholders, who had not gotten their money. I presume they had anticipated they were going to get their money. I remember there were more options put up than were taken up—a lot more. These preferred stockholders were complaining, and they were inquiring of me, because they had not gotten their money. This escrow was completed in the year 1930 as far as paying out the money was concerned. It was not completed in so far as taking up all of the options were concerned, a certain number of the options for the stock had been held until the period of time had more than expired and the stockholders were requested to withdraw their stock. All of the common stock of the Wise Manufacturing

(Testimony of Douglas F. Scott.)

Company was taken up and paid off, excepting common stock owned by the Standard Die and Tool Company, the old parent company. I cannot answer for sure that all of the common stock of the Standard Die and Tool Company was taken up but I think it was all taken up. In addition some of the preferred stock of the Standard Die and Tool Company was taken up. We had a long list of stockholders who were perfectly willing to take their money if it [107] was paid by Mr. Hays. However, he quit sending money so the options could not be exercised. This all occurred in 1930. I know that there was discontent on the part of the stockholders who had not received their money."

"Q. And there was discontent, also, wasn't there, about what Wise was getting out of it? Wasn't that pretty noisily kicked about in Berkeley and in the bank?

A. Yes, it was, yes.

Q. It was plenty strong that Mr. Wise had some sort of a contract in which he was getting some sort of a nice profit out of it, wasn't that said?

A. I cannot remember it was actually said, but it was intimated.

Q. Rather strongly from these stockholders, in 1930?

A. Yes."

"On April 3, 1931, Mr. Eltse addressed a letter to our bank proposing that the bank act as trustee under a declaration of trust which was submitted to the bank, and the bank refused to act as trustee.

(Testimony of Douglas F. Scott.)
I have the letter dated April 3, 1931. We returned the declaration of trust to Mr. Eltse."

The letter and the declaration of trust, so-called, referred to, and form of accompanying agreement for stockholders' signatures, were here received in evidence as the

Respondent's Exhibit "F".

This letter and the declaration of trust and agreement were admitted in the evidence after Mr. Clark had made Mr. Scott his witness, as regards the testimony concerning the so-called declaration of trust. Said letter reads:

"April 3, 1931

Bank of America
First Berkeley Branch
Berkeley, California [108]
Gentlemen: Attention: Mr. Scott.

We hand you herewith:

(a) Copy of agreement executed by Roy T. Wise;

(b) Copy of agreement to be executed by the preferred stockholders of Standard Die & Tool Company;

(c) Proposed copy of trustees certificate.

In each of said agreements an assignment is to be made to a trustee for the benefit of the preferred stockholders.

Under the agreement signed by Mr. Wise he transfers and assigns all of his right, title, claim and interest, either as stockholder, creditor or otherwise, in the Wise Patent & Development Company, including all shares of stock owned by him, subject to certain limitations therein specified.

Under the agreement to be signed by the preferred stockholders they are to assign and transfer to the trustee their respective stockholdings.

The general plan and purpose of the two agreements is that of liquidating the claims or paying the investment of the preferred stockholders out of proceeds to be derived from the Wise Patent & Development Company, a Delaware corporation, to which said Wise would otherwise be entitled as a stockholder therein or a creditor thereof. To accomplish that end it is necessary to have some one or some corporation act as trustee and we are asking your bank to consent to and to act as such trustee.

We have gone into this matter in detail with your Mr. Scott and Mr. Johnson.

After you have examined the enclosed agreements will you kindly return the same, stating whether or not your bank will act as such trustee. In the event of acceptance of the office originals of each of the agreements will be lodged with your bank.

Yours truly,
CLARK, NICHOLS & ELTSE
By RALPH R. ELTSE"

The declaration of trust, so-called, and accompanying agreement read as follows:

"KNOW ALL MEN BY THESE PRESENTS: That

WHEREAS we, the undersigned, are each the owners and holders of preferred stock in the Standard Die and Tool Company, Incorporated, a corporation incorporated by and under the laws of the State of California, and each owns the number of shares set opposite his signature; and

WHEREAS The Wise Manufacturing Company is a corporation incorporated by and under the laws of the State of California, and the Standard Die and Tool Company, Incorporated, owns and [109] holds, among its assets, Forty-six Hundred Seventy (4670) shares of common stock of the said The Wise Manufacturing Company; and

WHEREAS heretofore the said Standard Die and Tool Company, Incorporated, and/or its officers, have transferred, assigned and conveyed to the Wise Patent and Development Company, a corporation incorporated by and under the laws of the State of Delaware, certain patents and patent rights, interests in patents and interests in inventions and applications for patents, and it is the desire of all the parties to all of said transactions to obtain the consent and approval of the undersigned to such transactions, transfers and assignments; and

WHEREAS the preferred stock so held by the undersigned in the Standard Die and Tool Company, Incorporated, is of doubtful value, and Roy T. Wise has heretofore assigned and transferred all of his right, title and interest in and to the Wise

Patent and Development Company, either as stockholder or otherwise, to.....,
as Trustee, for the purpose of raising funds to pay to the undersigned the amount they and each of them have invested in the preferred stock of the said Standard Die and Tool Company, Incorporated, and which assignment so made by said Roy T. Wise provides the only method and means whereby the undersigned may realize anything because of their investment in the said Standard Die and Tool Company, Incorporated;

NOW, THEREFORE, for and in consideration of the sum of One Dollar ($1), receipt of which is hereby acknowledged, and other good and valuable consideration, and the execution of such assignment by the said Roy T. Wise, we, the undersigned hereby agree:

1. That we and each of us do hereby ratify, confirm, approve and consent to the transfer, conveyance and assignment of any and all of the patents, interests in patents and patent rights heretofore made by the Standard Die and Tool Company, Incorporated, and/or the officers of said corporation, to Roy T. Wise and/or to the Wise Patent and Development Company, of every kind and nature whatsoever, this ratification, confirmation, approval and consent being irrevocable and in no way dependent upon any other condition or conditions named in this instrument.

2. We and each of us do hereby accept the terms of the trust agreement heretofore executed by Roy

T. Wise whereby the said Roy T. Wise assigned and transferred to....., as Trustee, his right, title and interest of all kinds in and to the Wise Patent and Development Company for the benefit of the preferred stockholders of the Standard Die and Tool Company, Incorporated, and we and each of us hereby agree to and do transfer, assign, and set over our preferred stock in the said Standard Die and Tool Company, Incorporated, and agree to accept, in lieu thereof, Trustee's certificates as provided for in said trust agreement and upon the delivery to us of such Trustee's certificates hereby surrender, release and forever relinquish any right, title or interest which we may have as preferred stockholders of the Standard Die and Tool Company, Incorporated, in any of its assets, which it may now have, has had or hereafter may acquire, said interest in the said trust fund to be in full and [110] complete settlement of all of our rights as such preferred stockholders.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 1st day of April, A. D. 1931.

..... owner of ..... shares"

"AGREEMENT

WHEREAS, the undersigned, Roy T. Wise, holds, owns and/or controls all of the outstanding common stock of the Standard Die and Tool Company, Incorporated, a corporation incorporated by and under the laws of the State of California; and

WHEREAS, The Wise Manufacturing Company is a corporation incorporated by and under the laws of the State of California, and the Standard Die and Tool Company, Incorporated, owns and holds, among its assets, Forty-six Hundred Seventy (4670) shares of common stock of the said The Wise Manufacturing Company; and

WHEREAS, the said Standard Die and Tool Company, Incorporated, has heretofore transferred, assigned and sold certain claims, patent rights and patents now held under the Wise Patent and Development Company, a Delaware corporation, and it is the desire of the undersigned Roy T. Wise to have the preferred stockholders in the Standard Die and Tool Company ratify and confirm such transfers; and

WHEREAS, it is the desire of the undersigned Roy T. Wise to protect the investment of the preferred stockholders in the Standard Die and Tool Company, Incorporated, in their investment so far as that is possible:

NOW, THEREFORE, the undersigned Roy T. Wise, for and in consideration of the sum of One Dollar ($1) and other good and valuable consideration, the receipt of which is hereby acknowledged, and in further consideration of the ratification and confirmation by the preferred stockholders of the Standard Die and Tool Company, Incorporated, of the transfer, assignment, and sales heretofore referred to, and the acceptance by them of the benefits of this agreement, does hereby transfer, assign

and set over to....., as Trustee, and in trust, for the uses and purposes hereinafter set out, all of his right, title and interest of any kind and nature whatsoever, either as stockholder, creditor or otherwise in the said Wise Patent and Development Company, including all shares of stock owned by him, whether certificates have been issued therefor or not, and all interest of any kind or nature whatsoever which he may have in any of the assets of the Wise Patent and Development Company upon the following terms and conditions, to-wit:

1. It is understood and agreed that whatever interest is transferred by this assignment is subject to any debt owing by the undersigned Roy T. Wise to the Wise Patent and Development Company, and that the Trustee take whatever interest may be transferred to him by this assignment, subject to such indebtedness, including notes held by Alonzo C. Owens for the benefit of the Wise Patent and Development Company and signed [111] by Roy T. Wise.

2. It is understood and agreed that this assignment transfers to the above mentioned Trustee the equity which the undersigned may have in the stock issued by the said Wise Patent and Development Company to the undersigned and now held as collateral security by Alonzo C. Owens of Sullivan County, Indiana, and the said Alonzo C. Owens is hereby authorized and directed to deliver such certificates of stock, or the proceeds thereof, to the above named Trustee, if, when and as under said

collateral agreement such stock or the proceeds thereof, should be delivered to the undersigned.

3. The said Trustee above mentioned is hereby authorized and directed to hold the interests hereby transferred to it and to collect and apply any income arising therefrom or any distribution made because of the interest of the undersigned in and to the stock or assets of the Wise Patent and Development Company to the payment of the preferred stockholders of the amount invested by said preferred stockholders in the Standard Die and Tool Company, Incorporated, but not including any accrued dividend or interest thereon.

4. The Wise Patent and Development Company is hereby authorized and directed to pay to the said Trustee any and all dividends or income due to the undersigned Roy T. Wise, or any distribution to be made to the said Roy T. Wise because of any interest which he may have in the Wise Patent and Development Company either as stockholder, creditor, assignee, or otherwise.

5. It is expressly understood and agreed that this instrument creates no right, title or interest, legal or equitable, in the preferred stockholders of the Standard Die and Tool Company, Incorporated, except and only in the event they shall ratify and confirm the transfer heretofore referred to, and shall further accept the terms of this agreement for their benefit and shall surrender their preferred stock and the certificates therefor so that the same may be cancelled on the books of the Standard Die and Tool Company, Incorporated, and shall ac-

cept, in lieu of such stock, the certificates of the Trustee showing such surrender and cancellation and their participation in this trust and acceptance of the same.

6. The Trustee herein named is hereby authorized and directed, as sufficient moneys come into its possession because of this assignment and agreement, and when it, in its judgment, determines that it does have such sufficient funds, shall pay to the holders of the certificates issued in lieu of the preferred stock of the Standard Die and Tool Company, Incorporated, pro rata, in proportion to the amounts shown by such certificates to have been invested in the preferred stock of the Standard Die and Tool Company, incorporated, but in no event shall the holder of any such certificates receive more than the amount of such investment, without interest and without any further or accrued dividends.

7. It is understood and agreed that in the event said preferred stockholders shall be paid the amount of their investment by the Trustee hereinbefore mentioned, then this trust shall terminate and the Trustee herein mentioned shall transfer to the undersigned all the assets remaining in its possession because of this assignment. [112]

8. It is stipulated and agreed that if at the end of ten (10) years from the date of this agreement the moneys coming into the hands of the Trustee shall not have been sufficient to pay, in accordance with this assignment, to the holders of the certifi-

cates herein provided for the amount of their investment, then and in that event, Trustee herein is authorized and directed to sell such stock or stocks, interests, claims, credits of whatsoever nature he may have belonging to the undersigned, or so much thereof as may be necessary to pay off such certificate holders and preferred stockholders in the Standard Die and Tool Company, Incorporated, as have not been otherwise taken care of, and the said Trustee is hereby authorized and directed to make such sale at public or private sale as in its judgment it may deem advisable. It is hereby authorized and empowered to execute in its own name or in the name of the undersigned, any and all instruments in writing of every nature whatsoever necessary or advisable to carry out and into the effect the purposes of this agreement.

9. The undersigned, Roy T. Wise, hereby further agrees to sign and execute at the request of the Trustee, or any purchaser at any sale of the Trustee, any and all assignments, bills of sale or other instruments which shall be deemed necessary or advisable to fully transfer the interests of the undersigned in the Wise Patent and Development Company and for the purpose in carrying out the purpose of this agreement.

10. It is further understood and agreed that the terms and provisions of this agreement and assignment shall be binding upon the heirs, legatees, devisees, assigns, legal representatives and successors of the said Roy T. Wise.

IN WITNESS WHEREOF the undersigned has hereunto affixed his hand and seal this 2nd day of March, A. D. 1931.

ROY T. WISE [SEAL]

STATE OF ILLINOIS,
County of Cook.—ss.

Before me, the undersigned, a Notary Public in and for said County and State, this 2nd day of March, A. D. 1931, personally appeared ROY T. WISE, personally known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged the execution of the above and foregoing agreement to be his free act and deed.

WITNESS MY HAND and Notarial Seal.

EDWIN J. CHONA
Notary Public

The undersigned hereby accepts the above trust and agrees to administer the same in accordance with its terms.

Dated this.....day of.....A. D. 1931.

.....[113]

HALSY J. WHITE,

duly sworn as a witness for petitioners, testified as follows:

DIRECT EXAMINATION.

"I reside in Berkeley and at the time I first met Mr. Wise was connected as an employee with American Investment Company, affiliate of Bank of America at Berkeley. I am at present an employee of the Bank of America in San Francisco. In January 1929, Roy T. Wise asked my assistance in selling the unsold portion of a $30,000.00 issue of 8% voting preferred stock of Standard Die & Tool Company. I sold some of this stock to my customers. I never attended any official meetings of the preferred stockholders of the Wise Manufacturing Company. The only meeting I can recall was the one at the Mark Hopkins [114] Hotel, in San Francisco, at which time Mr. Waddell, acting as attorney for a certain group of preferred stockholders, invited me to come over, that Mr. McMahon—in fact, I understood most of the preferred stockholders would be there, to interview Mr. Hays. Mr. Hays was there. Mr. Eltse was there. Mr. Dobrzensky was there. Mr. McMahon was there. Another attorney was there with Mr. Hays whose name I cannot recall. This was March or April, 1932. There was nothing to my knowledge disclosed in regard to the contract between the Wise Manufacturing Company and the Wise Patent & Development Company. The transfer of the patents was not discussed. It was somewhat a so-

(Testimony of Halsy J. White.)

cial gathering. Mr. McMahon and Mr. Hays spent perhaps twenty minutes discussing more or less private affairs and politics and then the subject of how Mr. Hays became involved with Mr. Wise in the motor transmission came up. I gathered that Mr. Hays felt that he had been drawn into it with the hope of making money very much as the preferred stockholders had and that they both had the same difficulty. It was apparently his intention to convince the preferred stockholders that his situation was about the same as theirs and that the best that he could do for them was to suggest that they deposit their stock in escrow or accept a claim similar to his against the earnings, if and when obtained. Mr. Hays inquired whom I represented and I told him that while I had no stock of any of the three companies involved that my friends who did own this stock, would, I felt sure, not wish to accept anything more than a cash settlement for their stock. I did not make any attempt to find out anything about the patents. I never did know of nor was any mention made at that meeting about the transfer of the patents. I believe nothing was said about any contract at that meeting, in fact I am sure of it. Referring to prior times, I was a stockholder in the Standard Die and Tool Company and I did on several occasions before [115] depositing my stock in the escrow at the Bank of America at Berkeley attempt to ascertain the status of the Standard Die and Tool Company and the preferred stockholders and

(Testimony of Halsy J. White.)

the common stockholders in Standard Die and Tool Company, but I was given no satisfaction. I had five shares of common stock of the Standard Die and Tool Company. I finally deposited it in the escrow, and it was paid off later. I received for my stock the equivalent of $200.00 a share. That was paid me as testified by Mr. Scott yesterday, coming from Mr. Hays in the form of a check for $1600.00, $1000.00 of which was used to take up my stock. When I asked Wise what had become of the patent and what consideration if any there was, he just could not give me the details. I asked him what the status of the company would be and its patent and he made no answer. I questioned him several times in this regard, always with the same result. At one time he stated that he was not at liberty to disclose the information or something of that sort."

CROSS-EXAMINATION OF WITNESS WHITE.

"It was approximately June, 1930, when I received my money for my stock. Some of the preferred stock was taken up from stockholders who also held common stock. Practically all of the preferred stock was not taken up. Then these preferred stockholders began to complain and among them was Mr. McMahon and other stockholders with whom I was acquainted. There were numerous complaints. I complained very much myself at the way it was being handled. I told Mr. Wise

(Testimony of Halsy J. White.)
that because of the fact that he would not disclose the facts of his deal, I thought it was unfair to the stockholders, both preferred and common. The set price was $100.00 a share. To my knowledge no one ever asked me, and I never disclosed to anyone that I got more than the $100.00 a share. To my knowledge I am the only one that got more than $100.00 a share. My position there at the bank [116] was agent of American Investment Company affiliated with the Bank of America."

The witness was asked by Mr. Clark if one of the factors that contributed to his being able to get $200.00 a share for his stock instead of $100.00 was that by reason of his position in the bank he knew what was going on. The witness replied that there was a great deal going on at the bank that he had no access to.

"Q. And of course you knew the patents were being transferred?

"A. Oh, no.

"Q. You knew that someone was putting up a lot of money there at the bank didn't you?

"A. It was my supposition that a deal was being made for Mr. Wise who, it was reported, was receiving $1000.00 a month salary. I knew that a great deal of money was being put up there in the bank and that it was coming from Mr. Hays. Although I was an employee there in the bank, I had no access to these escrow files so as to know that the money was coming from Mr. Hays nor did Mr. Wise tell me that the money was coming

(Testimony of Halsy J. White.)

from Mr. Hays. The final information I had on that subject came at a time when I by chance saw Mr. Hays's check for $25,000.00. I could not say how long after the check arrived it was that I saw it. I did not at first hear of Mr. Hays's connection. I presumed this money would go out to the great batch of creditors very shortly after I saw the check although I saw nothing of the disposition.

"Q. You were a common stockholder in this company and you knew that the creditors were filing into the bank and they were getting their money?

"A. I assumed that they would get their money.

"Q. It was common information then that at the time these contracts were being made, that instead of defrauding the creditors, all the creditors were going to be paid?

"A. I believe that is correct. No list of creditors [117] was ever submitted to the common stockholders to show whether these creditors were paid off at that time. I complained to Wise about his withholding information about the transaction between himself and the other parties interested and stated that in the absence of information I felt that I would rather not see the deal go through, that I preferred to hold my common stock as I believed that it had a value in excess of $100.00 a share.

"Q. You were the last one of the common stockholders to take down the money that was put up for the common stock?

(Testimony of Halsy J. White.)

"A. I don't know. I accepted it when it was turned over to me."

"This meeting in San Francisco was after Mr. Waddell had unsuccessfully attempted to serve Mr. Hays and he come up voluntarily to discuss the matter with the preferred stockholders. Mr. Waddell had reported that for a period of five or six months previously to the San Francisco meeting, he had been unable to serve Mr. Hays in the case of Palm v. Diehl, the law suit that has been mentioned in the testimony here. I believe there was no mention at this meeting of any agreement whereby Mr. Hays and Mr. Wise and Mr. Diehl had become equal owners of the stock in the Wise Patent and Development Company.

"Q. You believe not? Had you heard that prior to your going there?

A. I heard the three names mentioned. It was rumored about before the meeting ever occurred that those three men had the stock of that corporation.

"Q. But its purpose was to see Hays, because at that time, and for several months prior thereto it was a known or rumored fact that Hays had received stock in this corporation and that there was some obligation on the part of Hays to make return to the stockholders of the Standard Die & Tool Company?

A. The stockholders felt they had a case against Mr. Hays. [118]

Q. You say that it is a fact that Mr. Hays stated that his situation was the same as the preferred stockholders?

(Testimony of Halsy J. White.)

A. Yes. Mr. Hays mentioned the depositing by the preferred stockholders of their stock in the Woolsey escrow and I think he referred to that as being the proper place. Nothing was said or nothing happened at that meeting about any arrangement having been made as the result of which the preferred stockholders would refrain from making service in the suit against Mr. Hays.

REDIRECT EXAMINATION OF THE WITNESS, WHITE.

"It is a fact that I got $200.00 a share for my common stock while everybody else received only a $100.00 a share and that a part consideration of that payment was my refraining from insisting on getting the facts of the transfers. That was the real and true consideration. Apparently they were willing to pay $1000.00 in order not to have to disclose the information to me. I was instrumental in having several people buy preferred stock, and after they were dissatisfied I interested myself in their behalf to find out all I could about what Mr. Wise was doing and what had become of the patents. I disclosed to the preferred stockholders only such information as I thought had any truth in it. I do not recall that I told any of them that I saw the $25,000.00 check signed by Mr. Hays. I told the preferred stockholders that it was rumored that the creditors were being paid at the bank. I did not tell them that I got $200.00 a share for my stock, for no one ever asked me. The original price of the

(Testimony of Halsy J. White.)

preferred stock was $100.00 a share. My understanding is that the preferred stock was taken up only in instances where persons held both common and preferred. My particular purpose in going to this meeting was to get information concerning the situation of the company, how the company stood, and what had happened to the patent and also to express the dissatisfaction of the preferred stockholders. I did not [119] get the information that I went there for."

CHARLES PALM,

called and sworn as a witness for the petitioners and testified:

DIRECT EXAMINATION.

"I reside in Berkeley. I am a professor of Modern History at the University. I am one of the preferred stockholders of Standard Die & Tool Company. I had ten shares. My stock was not taken up. I attended a meeting of the preferred stockholders at the Wise Manufacturing Company plant and a meeting in the office of Clark, Nichols and Eltse. I did not attend the Mark Hopkins Hotel meeting. I am quite certain that the meeting at the plant was after February 27, 1930. Mr. Wise was present also Mrs. Wise and I believe Mr. Eltse was there and also other persons. I can't remember their names. At that meeting the discussion that I recall was

(Testimony of Charles Palm.)

about the companies being in debt and the chance that the stockholders might have to pay an assessment unless something was done about it. A committee was appointed, but I could not tell you just what they were supposed to do. Either at that meeting or at the other meeting we were asked to put our stock in escrow. To the best of my recollection, no reference was made to the disposition of the patents or as to what had happened to them. I did know the company was in debt and that we might be called upon for an assessment. Prior to that meeting we had been asked to put the stock in escrow. That was in 1930, I believe, and with a promise that we would receive our money, and I put my stock up at that time. That was before the first meeting. At the second meeting nothing was said about the disposition of the patents nor about the formation of this new corporation, 'The Wise Patent and Development Company', and the only impression that I got was that the stockholders should come in under some plan. [120] At the second meeting I refused to come in because I had a feeling that my interests were not being protected; that if I came into that scheme I would throw away whatever chances I had of receiving my money. I cannot say that any questions were asked at that meeting concerning the patents. I never talked with Mr. Wise concerning the disposition of the patents. Prior to October, 1932, Mr. Waddell was my attorney and also had been the attorney for the Wise Manufacturing Company. At that time I employed Mr. Peters."

CROSS-EXAMINATION OF WITNESS, PALM.

"Mr. Waddell was my attorney in the matter of filing the Palm suit. I procured Powers of Attorney from the rest of the people and a certain amount of money to pay Mr. Waddell. Mr. Waddell had previously been a director of the company and that was one of the reasons that I employed him. He finally brought suit against A. N. Diehl, W. H. Hays and Roy T. Wise and the Wise Patent and Development Company. I know he finally did. I had to call on him a great number of times to try to do something and he seemed to try to put it off. I verified that complaint. He asked me to sign it and I glanced at it, but I did not know what it was all about."

"Q. You did not know you were suing Mr. Hays, Mr. Diehl and Mr. Wise?

A. Oh, yes, I knew that.

"Q. They have been referred to here as the 'unholy three'. Had they been referred to as the 'unholy three' before you caused this suit to be filed?

A. No, not exactly referred to in that language.

"Q. Had they been referred to in language indicating that they were three very smart gentlemen who had succeeded in getting all the stock of the Wise Patent and Development Company?

A. Yes, I probably referred to them in that way myself. [121]

"Q. Had you had several conferences with the other professors before this time?

A. I talked it over with my colleague, Professor Stevens, several times. I talked it over briefly with

(Testimony of Charles Palm.)

Horace N. Henderson. I talked also with Patrick H. McMahon an elderly man of about seventy years of age. I believe Mr. Waddell suggested getting the Powers of Attorney, (referring to the Powers of Attorney which he received from his co-plaintiffs). Mr. Peters was not mixed up in it at that time. I had a number of meetings with Mr. Waddell to try to get him to do something before this complaint was filed in the case of Palm v. Diehl. It was my honest conviction that the facts were sufficient to justify lodging a complaint against these three men." At this point Mr. Clark asked the witness upon what his conviction was based, and the witness replied: "I had invested my money with the concern and Mr. Wise invited me to visit the plant, showed me the invention, told me about the possibilities of it, how it had been adopted by several concerns in this state, the Caterpillar, and assured me of the fact that my preferred stock had sufficient security behind it. When I invested I received one dividend a little later, and I had the feeling that it was a good concern, and that when I was asked to put my stock in escrow, and while I realize that such things will happen, I did so, excepting to get my money out of it, and later on I was informed that I would not receive my money, and I heard that the common stockholders had been paid, some of them, where a preferred stockholder owned common stock, they had been paid, and although I know very little about business, my judgment told me that it was not right, consequently I made up my mind that until I had

(Testimony of Charles Palm.)

been shown just where the money had gone and what had become of the assets which I thought were mine, belonged to me as a preferred stockholder, I thought that I would refuse to sign any additional documents." [122] In answer to a question inquiring whether the witness had ever asked Mr. Wise what had become of the patents, he replied that he had attended this meeting to ascertain what had become of them, and the witness stated that: "If anything was said about what had become of the patents, it was not such as I was able to form a judgment as to what had happened to them." In answer to a question inquiring if the witness knew anything wrong about the company or if he based it upon suspicion, the witness replied that it was based to a certain extent on suspicion and also that he received the impression at this meeting that they were being intimidated and that the thing did not look right to him, and that while he was not acquainted with the details of the thing, he was not satisfied; that he would have been satisfied if he had received the money that he paid for his stock. The witness's attention was here directed to paragraph 13 in the complaint of Palm v. Diehl, and in answer to a question as to whether he had heard that they had formed this new corporation, The Wise Patent and Development Company, the witness replied in the affirmative. In answer to a question as to whether he had ascertained that the patents had been transferred to the Wise Patent and Development Company the witness answered in the affirmative,

(Testimony of Charles Palm.)

but stated that he had been under the impression that it was the same company with only a change in name. The witness was next asked if he had had the impression that Diehl and Hayes were interested in that company, and the witness answered that he did not know that.

"Q. Upon what did you base this particular statement? 'That the plaintiff is informed and believes and therefore states the fact to be that the capital stock of said Wise Patent and Development Company was divided into 1000 shares of preferred capital stock of the par value of $100.00 per [123] share, and 2500 shares of common capital stock of no par value. That plaintiff is informed and believes and therefore states the fact to be that all the said capital stock of said Wise Patent and Development Company, except for approximately five qualifying shares, is owned share and share alike by the defendants, A. M. Diehl, W. H. Hays and Roy T. Wise.'

"A. Well, that was drawn up by Mr. Waddell, I knew at the time that this was drawn up that Mr. Diehl and Mr. Hays were interested in the concern in some way.

Q. The Wise Patent and Development Company?

A. Yes, that they had arranged a deal whereby the patents were taken over by this company and then sold in some way to Westinghouse.

Q. Who told you about the Westinghouse deal?

(Testimony of Charles Palm.)

A. Mr. Waddell. I think this must have been in 1931 or thereabouts. I forget. I think I have heard that the Westinghouse Company was interested in the patents, but I did not know just what had happened with respect to the patents.

Q. You didn't know how it had been handled?

A. No.

Q. In this particular complaint, Professor, you asked that the whole deal be set aside and that the transfer to the Wise Patent and Development Company be recalled? Does it come back to your mind now that you did seek to have that done?

A. Well, Mr. Clark, to be frank with you, I relied upon my attorney, Mr. Waddell, to draw the complaint and I felt that he had my interest in mind and this is more a reflection of his knowledge of the matter than it is of mine."

"Q. He has been checking up on the matter for how long?

"A. I don't know.

"Q. Did he attend the meeting at the Mark Hopkins Hotel for the stockholders?

"A. He was the attorney at the time.

"Q. And it is your impression that he told you that he went there because the patents had been taken over by this company?

"A. No, as a matter of fact, based upon what I heard about that meeting I was rather disappointed; he did not seem to [124] take a definite stand relative to the matter.

"Q. Mr. Hays did not?

(Testimony of Charles Palm.)

"A. Mr. Waddell.

"Q. What I'm asking you is this: It was felt among you that it was at least proper to lay some sort of demand or request before Mr. Hays at that time?

"A. No, if I remember correctly, Mr. Clark, Mr. Waddell went there to see what Mr. Hays was willing to do.

"Q. On account of what?

"A. Relative to the liquidation of the company, I don't know just what it was."

REDIRECT EXAMINATION OF WITNESS, PALM.

"I never saw the contract of February 27, 1930, until the month of February in 1933 which was some time after I had employed Mr. Peters to act as my attorney. I did not attend the meeting at the Mark Hopkins Hotel, but I heard that Mr. Waddell did not take a very active stand at the meeting.

"I changed attorneys because Mr. Waddell did not seem to be able to make progress. There may have been political reasons. Interest in politics. That was just an assumption on my part."

RECROSS EXAMINATION OF WITNESS, PALM.

Mr. Clark asked the witness: "Starting at what time in 1931 did you feel that you had a grievance against Will H. Hays?" The witness replied, "Well, Mr. Clark, I did not feel at that time that

(Testimony of Charles Palm.)

I had a grievance against Will H. Hays. My feeling was that something was wrong, and I had not received my money and these meetings were called, and we were called, and we were given the impression that unless we did certain things we would lose everything."

"Q. You complained because Waddell did not go forward actively?

"A. Yes, in pushing the case.

"Q. And you felt you had a grievance against some one and that was why you went against him?

"A. Yes.

"Q. He filed that suit and that suit dragged along from [125] 1931 and you had the meeting with Mr. Hays in San Francisco and still the suit dragged along and finally you went to Mr. Peters?

"A. Yes."

The Court asked the witness when he put his stock into escrow. The witness replied: "I had put my stock up in escrow before the first meeting of the stockholders to which I referred and then when I found some of the stockholders had been paid, because they had common stock, I took a different stand."

EDWARD W. OLIN,

being sworn, testified as a witness for petitioners, as follows:

DIRECT EXAMINATION.

"I reside in Oakland. I am a technical expert mechanic rather than an executive. I was a director of the Wise Manufacturing Company from about November, 1929, to about January or February, 1931. I attended Board of Directors' meetings. I don't recall missing any meeting". In answer to questions by both Mr. Resleure and the Court as to when he first saw or heard of the contract of February 27, 1930, the witness testified that his first knowledge of the contract was in March of 1933, when it was shown to him by Mr. Peters. That prior to that time he had no knowledge of its existence or contents. He continued: "In none of the meetings of the Board of Directors was there any discussion of, nor were we ever advised of, the terms of any transfers of patents of the Wise Manufacturing Company. I think there were about a dozen meetings of the directors. The impression we all had was that the patents were sold for $25,000.00. I got that impression while working in the shop as shop superintendent. It was just common rumor, I don't know who might have said it or started it. It was shop gossip. I had one share of stock. Mr. Wise went east to sell the patents and when the money came back we thought it was for the sale of the patents." [126]

CROSS EXAMINATION OF WITNESS OLIN.

"My stock was in the Wise Manufacturing Company. I paid $20.00 for my share. I put it in escrow in the bank and received my pay for it. The stockholders were told to put their stock in escrow at the bank and it was understood that money had been obtained with which to pay off all of the creditors of the company. I recall the discussion of the resolution of the directors to call upon all of the creditors of the two companies to submit in writing their claims to the accountant for audit and later payment through escrow No. 167, Bank of America, Berkeley. The plan was to have all of the creditors deposit their claims. These accountants had been acting for the companies for some time. I saw them going through the books. And then at a certain time it was discussed at a meeting of the board that the creditors had received their pay. Those having claims up to December 31, 1929." Mr. Clark asked the witness if a part of this same plan was also to have all the stockholders deposit their stock with the bank and have the stock taken up. The witness answered that he did not recall that. Mr. Clark next asked it it wasn't suggested at the meeting that the stockholders should go over there to the bank and deposit their stock certificates. "You knew you did that along with the rest of them." The witness answered that he deposited his stock but that he did not know when it originated. The witness continued: "Later on the company became indebted to me. I do not recall

(Testimony of Edward W. Olin.)

the fact that a resolution was adopted authorizing the execution of the $25,000.00 second deed of trust with chattel mortgage provision. This was several years ago and I have had no chance to refresh my memory. I recall that I was secretary of the company on April 11, 1930. It is undoubtedly so that over my own signature, as secretary, there appears the [127] Resolution authorizing the borrowing of $25,000.00 to satisfy claims of creditors pending sale of corporate assets to Messrs. A. M. Diehl, Will Hays, et al. I do not remember voting for the Resolution. I remember getting the information that the $25,000.00 check had been sent to the bank so that payment of the creditors could start and taking up of the stock. I don't know where the information came from. I was worried about keeping the doors of the shop open more than I was worried about what was going on upstairs."

"Q. In other words, they had been making it pretty lively for the corporation, hadn't they?

"A. I will say so.

"Q. And this plan which was so secret, you knew the object and purpose of what was being done, was to take up all of the stock and pay off all of the creditors?

"A. That was our impression. Personally, I had no interest in this so-called plan except that $20.00 share of stock in the Wise Manufacturing Company.

"Q. You knew that Waddell had been an attorney for this corporation also, didn't you?

(Testimony of Edward W. Olin.)

"A. Yes, I knew that."

In answer to a question as to whether or not he felt that these transfers were being made to defraud the creditors, the witness said: "When Mr. Wise went east we had a report from him that everything was going well and it seemed like a fine opportunity of selling the transmission to the Westinghouse people and from the proceeds of that sale we expected all the creditors would be paid and the stockholders cleaned up and the shop continue to operate."

"I do not remember that after the concern kept going on a mortgage was put on the personal property. I remember the adoption of a resolution proposing the putting of another mortgage upon all the machinery and equipment of the plant and that Mr. Owens was called upon to consent to that and that that was for about $5000.00, and that this was to clean up the [128] additional debts which had accumulated. I remember that they succeeded in getting from Mr. Owens his agreement to subordinate the first mortgage on the personal property so that the new chattel mortgage could be put on for $5000.00." In answer to a question as to whether or not he had any feeling that Owens, or Wise or Hays, any one of them, was attempting to defraud him as a creditor, the witness replied: "I had a feeling that something was wrong in January, 1931. During the several months when Mr. Wise was East I kept in almost weekly communication with him sometimes two or three letters. I was

(Testimony of Edward W. Olin.)
shop superintendent. I had nothing to do with the actual management of the plant, and during this time Mr. Wise asked me to keep the plant going and he assured me repeatedly by letter that there was $5000.00 coming from the East and this did not come and there was money due and it got to the point that I took it up with the shop boys and showed them letters I was receiving from Mr. Wise assuring me he was doing everything he could to raise additional funds, and put it up to the shop boys themselves whether or not they would continue, knowing that they were not receiving their wages, and I also acquainted the shop with the fact that the accounts receivable we had would in a measure protect a certain portion of this wage and they elected to remain. But about January I made my mind that Mr. Wise was unable or could not possibly get $5000.00 in the East and Mrs. Wise had made efforts to raise a $5000.00 loan locally, which she was not able to negotiate, so about the latter part of January I decided that it had gone far enough and presented our claims to the Labor Commissioner.

"I am one of the petitioners in this matter, my claim being $239.34. I did not know until we began to protect our wage claims about the first chattel mortgage. The meetings of the directors were held at the plant. The Resolutions [129] of the Wise Manufacturing Company were prepared by Mr. Waddell and the minutes of the Standard Die and Tool Company were prepared by Mr. Eltse. Mr.

(Testimony of Edward W. Olin.)
Wise presided when he was there, it was all in order."

"Q. Did you know what was going on at every meeting?

"A. Yes, when I was present, everything that he cared to reveal I knew of course.

"Q. Were any papers prepared and presented for your signature after a meeting?

"A. It runs through my mind that I did sign a note as secretary of the company but I believe that was all right. I believe it was authorized. It was probably the $25,000.00 note that I signed. At that time it was fresh in my memory, but that is three or four years ago."

There was here received in evidence as

Respondent's Exhibit "G"

the Deed of Trust with Chattel Mortgage provisions dated May 16, 1930. In substance this instrument was as follows: It was executed by the two California corporations. It ran from them to American Trust Company as Trustee and it transferred to the Trustee as security for the payment of the $25,000.00 note, a copy of which was attached to the instrument, the real property of the Wise Manufacturing Company and the machinery and motors of the company located in its Berkeley plant. A list of the items of personal property was set out. The instrument further contained provisions for selling

(Testimony of Edward W. Olin.)
the real or personal property together or separately in the event of default in paying the note. Attached to the instrument was a copy of a promissory note dated May 16, 1930, running from the two companies to Alonzo C. Owens. The Deed of Trust and the note were signed by the witness as secretary for the Wise Manufacturing Company.

Witness continuing:

"It has slipped my mind that I signed these instruments. [130] I remember that prior to the signing of this there was a Deed of Trust on the real property for something like $18,000.00 and that this was unpaid.

"I employed Mr. Waddell to act as my attorney to take charge of our wage claims and he brought an action on my wage claim. I verified the complaint which Mr. Waddell prepared. He brought suit in Oakland and judgment was obtained and that is the judgment mentioned in these proceedings. Mr. Waddell was also attorney for Mr. Ralph Sites."

It was here stipulated that the actions upon the Olin claim and upon the Sites claim were commenced April 29, 1931, and that they both went to judgment in January or February, 1932.

Here the petitioners closed their case.

There was next offered in evidence by the respondents as their

Exhibit "H"

a transfer of patents dated May 8, 1930, endorsed as recorded May 22, 1930, Liber E-144, page 275, in the records of the office of Commissioner of Patents. In this instrument Roy T. Wise transfers to Wise Patent and Development Company all rights under application dated July 17, 1929, for letters patent, the serial No. of the application being 378,862 and all rights under application dated July 24, 1929, the serial No. being 380,634, the device referred to being an invention or improvement in a constant mesh gear transmission clutch.

The respondents next offered in evidence as

Respondents' Exhibit "I",

an assignment running from Standard Die & Tool Company dated May 5th, 1930, and running to Wise Patent and Development Company, the endorsements on which showed recording on May 22nd, 1930, in Liber E-144, page 277 of the U. S. Patent Office records. This instrument purported to transfer to the Wise Patent and Development Company the patents and the rights under the patent applications which are referred to in the [131] contract of February 27, 1930, petitioners' Exhibit "3".

(Where it is stated that an exhibit was offered in evidence, the same was admitted in evidence unless otherwise indicated.)

The respondent here offered and there was received in evidence as their

Exhibit "J",

an indenture made between Frank L. Hain and Alonzo C. Owens, dated the 5th day of June, 1931. This instrument recites that the grantor, Frank L. Hain has been substituted under the trust deed (respondents' Exhibit "G" the Deed of Trust with Chattel Mortgage Provisions) and that default had occurred in paying the $25,000.00 note and that upon proceedings duly had the personal property subject to the deed of trust had been regularly sold to the beneficiary, Alonzo C. Owens for the sum of $12,000.00, that the sale was at public auction and that he was the highest and best bidder and that pursuant to such sale proceeding, the trustee, Frank L. Hain, and in consideration of the payment of said bid, the personal property so sold, is transferred to the said Alonzo C. Owens. The instrument contained a particular description of machinery and equipment following the description set out in the trust deed and recited that such personal property was sold to the said Owens.

There was next received in evidence as the

Respondent's Exhibit "K"

an agreement on the part of Alonzo C. Owens dated the 24th of December, 1930.

Mr. CLARK.—"Now, Mr. Resleure, I have a statement as to the stockholdings in these companies. The stockholdings in the Standard Die & Tool Company are as follows: Mr. Wise held 660 shares of the common and 5 shares of the preferred. There was outstanding in shares 34 shares of the common and 258 shares of the preferred. That represented an issue that had occurred under the Corporation [132] Commissioner's permit up to the time these contracts were made."

The COURT.—"Are any of the parties to this proceeding before the Court stockholders in the Standard Die & Tool Company?"

Mr. CLARK.—"They are not."

The COURT.—"When was the Standard Die & Tool Company organized?"

Mr. CLARK.—"It was the first company that was organized, several years before the Wise Manufacturing Company was organized, I understand. Now, then, the Standard Die & Tool Company transferred its assets or agreed to transfer its assets to the Wise Manufacturing Company in consideration of the issuance of certain stock, and the Corporation Commissioner's permit provided a certain maximum amount of stock that might be issued to the Standard Die & Tool Company in the Wise Manufacturing Company. At the time the three contracts were made there was outstanding and owned in the Wise Manufacturing Company the following stock, Standard Die & Tool Company owned 4670 shares."

The COURT.—"Common?"

Mr. CLARK.—"It was all common, and other persons owned 216 shares. There had been subscribed 55 shares, and there were an additional 216 shares——"

The COURT.—"You say there had been subscribed."

Mr. CLARK.—"The subscription had not been fully paid, and in addition there were 216 shares that were in escrow under the provisions of the Corporation Commissioner's permit."

Testimony closed.

On April 6, 1934, the Court permitted the reopening of the case. It was there stipulated by counsel that various papers which Mr. Clark had obtained from Mr. Dobrzensky's [133] office might be placed in evidence.

There was next admitted in evidence as

Respondent's Exhibit "L"

a copy of a letter dated January 17, 1933, from Mr. Dobrzensky to Mr. James E. Waddell, on which letter was endorsed a receipt of the same date by Mr. James E. Waddell. As a part of the same exhibit there was also received an agreement referred to in the letter of January 17, 1933, and bearing the date, April 1, 1931, together with an-

other agreement signed by Alfred E. Elkinton. The first mentioned agreement was signed by a long list of the preferred stockholders of the Standard Die and Tool Company. The letter, except date and address given above and signature, reads:

"In re: Palm v. Diehl, et als.

I hand you herewith an original agreement dated April 1, 1931, bearing the signature of numerous parties ratifying a conveyance of patent rights, etc., heretofore made by Standard Die and Tool Company, Inc., etc. to Mr. Roy Wise and/or the Wise Patent and Development Company.

This is handed to you for the purpose of securing the signatures of Mr. McMahon and associates. You will please retain this in your office and surrender possession to no one other than the undersigned.

Under the present arrangement certain moneys are to be made available to Mr. Wise and are to be used in retiring the preferred stock. The moneys available to Mr. Wise or the Wise Company will be such sums as will arise after the payment of such sums as were advanced to Mr. Wise for his account and used by him on account of the Wise California Companies.

We are agreeable that such moneys as might accrue and be paid to Mr. Wise through the ownership of his stock in the Wise Patent and Development Company should be applied first, in the repayment of loans made to Mr. Wise and used by him in the payment of debts of his California Companies; and second, in the retirement of the

preferred stock in the Standard Die and Tool Company, Inc., including the preferred stock in the present trust, as well as the stock, the owners of which have not yet subscribed to the trust; and third, in the repayment of other loans made to Mr. Wise in the premises. Under the existing arrangements all moneys advanced to Mr. Wise would be fully repaid before any moneys would be available for the outstanding preferred stock. Under the suggested arrangement the owners of the preferred stock in the Standard Die and Tool Company, Inc. would receive pro-rata the amount necessary to retire the stock before Mr. Wise would be refunded [134] moneys, due from him by reason of loans made to him which he used in the purchases in connection with the California Companies. I think it has already been conceded that the moneys which were loaned to pay off the debts of the California Companies should be first refunded.

Mr. Wise has heretofore advised us that he consents to this arrangement. In addition to the foregoing we are further willing that the amount of loans made to Mr. Wise and used by him in the payment of the debts of the California Companies may be reduced by the application to the payment of interest and principal of such net amounts as have been realized from the sale of machinery and equipment bought in under foreclosure of mortgage.

I believe that this is completely in keeping with the arrangements heretofore verbally outlined to you. In the event that the matter has not been stated herein with sufficient clarity we will be glad

to discuss with you such further assurances as may be necessary and if need be will procure the written consent of Mr. Wise to the arrangement which has been suggested.

Will you kindly acknowledge receipt of the enclosures?

The suggestions hereinbefore set forth are made on condition that Mr. McMahon and those associated with him execute the trust arrangement."

On the side of the foregoing letter is said endorsement reading:
"Received trust agreement 1-17-33, James E. Waddell."

The agreement above referred to bearing date April 1, 1931, was the same as the instrument headed "Agreement" which is a part of Respondent's Exhibit "F", excepting that the name W. P. Woolsey was inserted in the blank appearing in the 4th paragraph of the form of agreement contained in Respondent's Exhibit "F" and excepting that the agreement was signed by various persons who had also put down the number of shares claimed by them, the names of the signers and the number of shares appearing at the end of the agreement being as follows:

W. E. Woolsey, 5 sh.; William C. James, 2 sh.; Linden Naylor, 10 sh.; W. P. Woolsey, 5 sh.; Amelia Everett Bass, 1 sh.; A. W. Elkinton, 3 sh.; William E. Bowen, 1 sh.; William A. Morgan and/or Leolyn

Morgan, [135] 10 sh.; Jerry S. Thompson, 2 sh.; Ruth B. Johnson, 15 sh.; Carl W. Carlson, 1 sh.; Neill J. Cornwall, 10 sh.; Fred Zimmerman & Martin Zimmerman, 1 sh.; Peter Hanson, 1 sh.; Agnes C. Moody and/or Robert Orton Moody, 10 sh.; Perry Tompkins, 3 sh.; Louis B. Reynolds, 4 sh.

The separate agreement signed by Alfred E. Elkinton was in the same form as that which was signed by the preceding list of shareholders. After the signature of Alfred E. Elkinton there was entered "Owner of 10 shares".

Attached to the two copies of the agreement referred to was a form of trustee's certificate reciting that the holder had surrendered his preferred stock in Standard Die & Tool Company and had in writing agreed to accept the terms of the trust agreement dated March 2, 1931, in which Roy T. Wise transferred and assigned to said trustee certain properties for the benefit of such of the preferred stockholders of the Standard Die & Tool Company as should accept the terms of the said trust, place being left for the signature of the trustee.

The letter and the instruments last referred to went in as Respondent's Exhibit "L".

It was stipulated that Mr. Dobrzensky, if he were present, would testify that the papers constituting the above exhibits of respondent were first given to Mr. Waddell as attested on Mr. Dobrzensky's letter and then that after this particular plan of settle-

ment broke down, Mr. McMahon refusing to enter into it and probably some of the other preferred shareholders, Mr. Waddell brought these papers back to Mr. Dobrzensky's office.

There was next admitted as

Respondent's Exhibit "M"

a letter from Hays and Hays to Mr. Dobrzensky dated August 23, 1932, for the purpose of fixing the time of the meeting in San Francisco and the letter refers to the fact that the meeting was held August 15, 1932.

The witness,

FREDERICK W. PETERS,

was here recalled as a witness for the respondent and he testified:

Mr. CLARK.—Q. Mr. Peters, in cross-examining you, I looked at the date on the agreement which I understood—copy of the agreement which I understood had been signed by [136] various of the preferred stockholders, and noted that it was signed as of April 1, 1931, and in my questions to you I examined on the theory that there were two of those agreements. You mentioned that Mr. McMahon, for certain reasons, had declined to go forward with the trust agreement. You did ascertain that?

The WITNESS.—A. No, it was not McMahon; it was the Bank of America had refused to act as trustee.

(Testimony of Frederick W. Peters.)

Q. Then you referred to the W. P. Woolsey trust in which he was the trustee?

A. Yes.

Q. And your check-up showed that until this blew up for failure of some of the stockholders to concur in it, Mr. Woolsey, insofar as stockholders who had signed was concerned, was to act as the trustee?

A. Yes, I believe I saw a blank copy of that agreement that Mr. Wise showed me.

Q. You saw a copy of the trust agreement that Mr. Wise had shown you, and W. P. Woolsey, as referred to in this paper here, was proposing to act as trustee instead of the Bank of America?

A. That is right.

Q. And there was only one of these attempted trust agreements and not two, insofar as signing up all the preferred stockholders was concerned?

A. I really don't know, Mr. Clark.

Q. You only learned about one?

A. Yes, the one I heard about, the bank.

Q. And you only learned of there being one attempted trust arrangement, in which the signing stockholders were to be the beneficiaries of the trust?

A. I only saw one agreement; that was the W. P. Woolsey agreement.

It was here stipulated that at the meeting in San Francisco which was held at the Mark Hopkins Hotel and which was attended [137] by Mr. Hays,

Mr. Waddell, Mr. White and the other persons referred to in the testimony that the Palm suit was discussed, that Mr. White asserted himself as being, so far as the people he appeared for were concerned, opposed to this trust agreement, his opposition being based on the fact that he did not have sufficient facts on which to base a consent; that words occurred between Hays and White and that Mr. Hays stated to Mr. White that he had better not threaten any actions.

The foregoing Narrative Statement of Evidence, prepared under Equity Rule No. 75 is hereby settled as being true and complete, and is hereby approved.

Dated August 28, 1934.

A. F. ST. SURE.

STIPULATION.

It is stipulated the above and foregoing narrative statement of the evidence in the within entitled case may be signed by the Court.

Aug. 27, 1934.

CLARK, NICHOLS & ELTSE,
Attorneys for Respondent.

RESLEURE, VIVELL & PINCKNEY,
Attorneys for Petitioners.

[Endorsed]: Filed Aug 25, 1934, 11:15 A. M. Walter B. Maling, Clerk. [138]

[Title of Court and Cause.]

PETITION FOR AN ORDER ALLOWING APPEAL.

To the above entitled Court, and the Honorable Judges thereof:

WHEREAS the WISE MANUFACTURING COMPANY, Respondent in the above entitled proceeding, considers itself aggrieved by the order of the above entitled court, rendered in the above entitled proceeding, declaring and adjudging said respondent a bankrupt for the reasons and because of the errors set out in the Assignment of Errors presented and filed with this Petition,

NOW, THEREFORE, the said respondent does hereby appeal from the aforesaid order to the United States Circuit Court of Appeals for the Ninth Circuit, upon all of the grounds and for the reasons specified in the Assignment of Errors filed herewith, and prays that said appeal may be allowed and that a citation in due form shall be issued herein directed to the petitioners in the above entitled proceeding, commanding them to appear before the said Circuit Court of Appeals to do what may be adjudged to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order was made shall be [139] duly made and authenticated and sent to the aforesaid Circuit Court of Appeals, and that such other and further order may be made as may be proper.

Dated June 1, 1934.

CLARK, NICHOLS & ELTSE,
G. CLARK,
Attorneys for Respondent

ORDER ALLOWING APPEAL.

In the above entitled cause (mentioned in the petition to which this order is attached) it is ordered that the appeal therein prayed for shall be and the same is hereby allowed, and the court hereby fixes the amount of the cost bond to be given by the respondent on said appeal at the sum of $250.

Dated June 1, 1934.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Jun 1, 1934, 10:12 A. M. Walter B. Maling, Clerk. [140]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

The respondent in this proceeding, in connection with its Petition for Writ of Error, makes the following Assignment of Errors, which it avers occurred in the trial and determination of this proceeding:

1. The court erred in refusing to strike out the amended petition filed herein, on the ground that the same was not in law an amendment of the original petition filed herein on March 30, 1933.

2. The court erred in refusing to dismiss the amended petition filed herein, on the ground that the same was not an amendment of the original petition filed herein.

3. The court erred in determining that the original petition filed herein could be amended by the filing of the amended petition herein.

4. The court erred in finding and determining that respondent concealed an asset or item of property of respondent in that it concealed the so-called contract of February 27, 1930, the fact appearing that the said contract was changed in vital particulars and superseded by later written contracts executed by the same parties, with respect to the same subject matter. [141]

5. The Court erred in treating said so-called contract of February 27, 1930, as representing the rights of respondent, whereas it distinctly appeared from the evidence that said contract was not in force, that it had been altogether changed, and that the petitioning creditors knew this more than four months prior to March 30, 1933, the time of the filing of the original petition herein.

6. The Court erred in finding and determining that concealment from the creditors of respondent of the contract mentioned in Paragraph V(a) of the amended petition did in fact occur.

7. The Court erred in finding and determining that concealment from the creditors of respondent of the contract mentioned in Paragraph V(a) of the amended petition occurred within four months prior to filing of the original petition on March 30, 1933.

8. The Court erred in finding and determining that concealment of said contract occurred within

four months prior to the filing of the amended petition.

9. The Court erred in refusing to find and hold that the contract of February 27, 1930, mentioned in Paragraph V(a) of the amended petition was not the contract under which the patents therein referred to were transferred and held.

10. The Court erred in refusing to hold and determine that the petitioning creditors did have knowledge of the making and existence of the contracts which represented the arrangements under which the patents referred to were transferred more than four months prior to March 30, 1933.

11. The Court erred in finding and determining that respondent could be adjudicated a bankrupt and in adjudicating [142] respondent a bankrupt for concealment of property or for wrongs other than those charged in Paragraphs V(a) and V(b) of the amended petition.

12. The Court erred in finding alleged acts of concealment or wrongdoing which were not alleged, and in basing the order of adjudication thereon.

13. The Court erred in finding acts of concealment and wrongdoing on the part of the respondent which were entirely outside of what was alleged in the amended petition, and in basing the order of adjudication thereon. Nothing but the contract of February 23, 1930, is referred to in Paragraph V(a). The evidence showed that that contract did not exist, that it did not represent the arrangement under which the patents were held. The allegation

that said contract was an asset of the respondent was untrue.

14. The Court erred in finding and determining that concealment from the creditors of respondent of the property mentioned in Paragraph V(b) of the amended petition did, in fact occur.

15. The Court erred in finding and determining that concealment from the creditors of respondent of the contract mentioned in Paragraph V(b) of the amended petition occurred within four months prior to the filing of the original petition of March 30, 1933.

16. The Court erred in finding and determining that concealment of said property occurred within four months prior to the filing of the amended petition.

17. The Court erred in refusing to find and to hold that over a year prior to the filing of the amended petition the bank deposit and moneys referred to were used up and ceased to be an asset of the respondent corporation. [143]

18. The Court erred in making an order adjudicating respondent a bankrupt.

19. The Court erred in finding and determining that respondent had concealed its property from its creditors with a view to hinder, delay and defraud them and within four months prior to the time of filing of the original petition herein on March 30, 1933.

20. The Court erred in finding and determining that respondent had concealed its property from its

creditors with a view to hinder, delay and defraud them and within four months prior to the time of the filing of the amended petition herein.

21. The Court erred in overruling the preliminary objections made to the taking of testimony as to declarations or statements made by Roy T. Wise, upon the ground that the said Roy T. Wise did not have authority to speak for or bind the respondent by his statements or admissions. The objections referred to were, with the consent of the Court, made at the very outset of the taking of the testimony of the witness Peters. The objections were repeated from time to time, and they were all overruled. The objections referred to were those objections which went to the whole of the testimony of the witnesses to the declarations or statements of Roy T. Wise, offered for the purpose of showing the respondent had concealed the execution of the contracts under which the patents referred to were transferred.

WHEREFORE the respondent prays that the order of the District Court adjudicating the respondent a bankrupt may be reversed.

Dated, June 1, 1934.

G. CLARK,
CLARK, NICHOLS & ELTSE,
Attorneys for Respondent.

[Endorsed]: Filed Jun 1, 1934, 10:12 A. M. Walter B. Maling, Clerk. [144]

[Title of Court and Cause.]

AMENDED PRAECIPE.

To the Clerk of the above entitled Court:

Please prepare in the above cause a transcript of the record to be transmitted to the United States Circuit Court of Appeals of the Ninth Circuit in pursuance to the appeal heretofore taken in said cause by the Wise Manufacturing Company, and include therein the following:

1. Original petition, filed March 30, 1933.

2. The order, dated May 31, 1933, granting permission to file amended petition.

3. Amended petition.

4. Answer to amended petition.

5. The findings.

6. Statement of evidence under Equity Rule No. 77 to be hereafter prepared and lodged with the clerk, pursuant to Equity Rule No. 75.

7. Order adjudicating appellant a bankrupt.

8. Petition for and order allowing appeal.

9. Assignment of errors.

10. Praecipe for transcript, or stipulation as to context of record if stipulation obtained.

11. Citation on appeal.

12. Clerk's certificate to record.

CLARK, NICHOLS & ELTSE,
Attorneys for Appellant.

Dated, Aug. 30, 1934.

[Endorsed]: Filed Aug 30, 1934, 11:48 A. M. Walter B. Maling, Clerk. [145]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 145 pages, numbered from 1 to 145, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of Wise Manufacturing Company, a corporation, In Bankruptcy, No. 23,-049-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of twenty-one dollars and seventy-five cents ($21.75) and that the said amount has been paid to me by the attorneys for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 31st day of August A. D. 1934.

[Seal] WALTER B. MALING,
Clerk.
By C. M. TAYLOR,
Deputy Clerk. [146]

[Title of Court and Cause.]

CITATION.

UNITED STATES OF AMERICA.—ss.

To the petitioners in the above entitled proceeding, and to their attorneys and solicitors of record:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 30th day of June, 1934, pursuant to the appeal duly obtained and filed in the office of the Clerk of the United States District Court for the Northern District of California, in a case entitled "In the Southern Division of the United States District Court for the Northern District of California, Second Division, In the Matter of Wise Manufacturing Company, a corporation, Respondent, No. 23,049, Bankruptcy", the Wise Manufacturing Company, a corporation, being the appellant, and E. W. Olin, Ralph Sites and Berkeley Pattern Works being the appellees, and you are required to show cause, if any there be, why the order and [147] decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the HONORABLE A. F. ST. SURE, United States District Judge, for the Northern District of California, this 1st day of June, 1934, and of our independence the 158th.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Service of the within citation admitted this June 1, 1934.

RESLEURE, VIVELL & PINCKNEY,
Attorneys for Petitioners.

Filed June 1, 1934, 11:22 A. M. Walter B. Maling, Clerk. [148]

[Endorsed]: No. 7604. United States Circuit Court of Appeals for the Ninth Circuit. Wise Manufacturing Company, a Corporation, Appellant, vs. E. W. Olin, Ralph Sites and Berkeley Pattern Works, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed August 31, 1934.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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No. 7604

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WISE MANUFACTURING COMPANY (a corporation),

Appellant,

vs.

E. W. OLIN, RALPH SITES and BERKELEY PATTERN WORKS,

Appellees.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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INTRODUCTION.

The Wise Manufacturing Company is a California corporation. On May 24, 1934, it was adjudged a bankrupt by an order made in the Southern Division of the United States District Court, Northern District of California. (p. 32.) It appeals from this order. (The references in parentheses will be to the pages of the transcript. Where the reference is to the testimony of a witness, the name of the witness will be given.) The trial was by the court without a jury, and upon an amended petition filed June 7, 1933 (p. 12), and the answer thereto. The original petition was filed March 30, 1933. (p. 6.) The record presents the evidence on which the order was based.

The petition was filed by three creditors, to-wit: E. W. Olin, Ralph Sites, and Berkeley Pattern Works. (p. 3; p. 8.) The amended petition charged that the corporation had concealed certain of its assets for the purpose of hindering, delaying and defrauding its creditors, that the assets so concealed consisted of a certain contract dated February 27, 1930 (p. 9), and a certain bank deposit made in the year 1931. (pp. 10, 11.)

As to the contract of February 27, 1930, it is alleged that this contract was made by Roy T. Wise, president of Wise Manufacturing Company, and that he controlled said company and that Ambrose N. Diehl and Will H. Hays were parties to this contract and that the contract recited that Wise would cause the said company to transfer to Wise Patent and Development Company, a corporation to be organized under the laws of Delaware, certain patents owned by Wise Manufacturing Company, covering the Wise Multi-Speed Transmission and that this would be in consideration of the sum of $75,000.00 to be paid by these three individuals; that the Delaware Company was formed and the patents transferred and that the consideration named in the contract is sufficient to satisfy the claims of all creditors of Wise Manufacturing Company; that the said patents were the "only assets of any considerable value owned by respondent"; "that no consideration was or ever has been received by the respondent for said United States patents"; that "the said contract, as a valuable asset of respondent corporation, was and has been secreted

and wholly concealed by respondent corporation from the creditors of respondent corporation"; that the "petitioners were totally unaware of the existence of said contract and had no knowledge thereof until the 30th day of March, 1933, on which day the existence of said contract was first revealed to your petitioners". (p. 9.)

As to the bank deposit of $605.00, it was alleged that this money was derived in the year 1931 from sales of certain tools, machinery, etc. It was not alleged that the sales were fraudulent. It was charged that the money was fraudulently and secretly deposited in the West Berkeley Branch of Bank of America in the name of H. Jacobson; that this money, "is the property of respondent" and that petitioners were "totally unaware" of this concealment until April 27, 1933. (pp. 10 and 11.) It is alleged:

> "That respondent received the approximate sum of six hundred and five dollars ($605.) from said sales. That said respondent, through its president Roy T. Wise, with intent to hinder, delay and defraud its creditors, caused the said approximate sum of six hundred and five dollars ($605) to be deposited in the West Berkeley Branch of the Bank of America, Berkeley, California, in the name of H. Jacobson. That the above mentioned sum of six hundred and five dollars ($605) *is* the property of respondent, and was and has been concealed and secreted by the said Roy T. Wise from the creditors of the respondent. That your petitioners were totally unaware of the said sale and fraudulent concealment of these assets, and had no knowledge thereof until the 27th day of April, 1933, on which

date the above mentioned transaction was first revealed to your petitioners." (pp. 10 and 11.)

The court will note that when the foregoing pleading was framed, it was the theory of the plaintiff that to constitute concealment of this deposit, it was necessary to show not merely the fact that concealment was not known until within four months prior to the filing of the petition, but that it was essential to show that the asset alleged to have been concealed was in existence and was concealed within the four months period. The word "is" is used. Throughout the trial of the case, appellant insisted that Section 21, Chapter 3, Title 11 of the United States Code, Section 3 of the Bankruptcy Act, meant that there could not be an act of concealment within the four months period unless the property concealed existed in said period.

First it will be noted that the answer denied in detail that there had been any concealment of the contract of February 27, 1930, for the purpose of hindering, delaying or defrauding creditors of Wise Manufacturing Company; that the answer denied that said contract contained the provision relied on for the payment of $75,000.00; that the answer proceeded to set forth, in effect, that there was no contract which contained the substance of the contract alleged in the petition; that while the contract of February 27, 1930, provided for the payment of $75,000.00 in a certain way, this payment was to be upon condition, and that the contract of February 27, 1930, had been substantially varied and modified by two later contracts, the one dated May 8, 1930, and the other dated Septem-

ber 1, 1930, and that the provision for paying the $75,000.00 to the corporation was eliminated. The answer alleges that these contracts were made with a view to raising funds *to pay off* the creditors of Wise Manufacturing Company and to provide funds to buy up the stock of that company and another company, the Standard Die & Tool Company, which owned nearly all the stock of Wise Manufacturing Company. Concealment of the contract of February 27, 1930, or of any contracts is specifically denied and it was likewise specifically denied that there had been any concealment of any property of said corporation within four months of the filing of the original petition on March 30, 1933, or within four months of the filing of the amended petition on June 7, 1933.

The answer admitted the sale of the tools, machinery, and equipment for $605.00. It alleged that Roy T. Wise, president of the corporation, in order to make it possible to distribute this money equally, did deposit the same in the name of H. Jacobson for the purpose of preventing its being attached and for the purpose of preventing anyone from obtaining a preference thereby; that the deposit was not for the purpose of concealment with intent to hinder, delay or defraud any creditor, and that in the year 1931 this money was largely paid out by Wise and that most of the balance was withdrawn by H. Jacobson to pay herself wages and that the remainder was applied by Wise in paying a claim for legal services; that this all occurred in 1931. Then it was denied that there was any concealment of this property within four months of the filing of the original petition, or

within four months of the filing of the amended petition. (pp. 13, 31.)

The court will note that the trial court in Finding V (pp. 36 to 41) proceeded to set out at length a fraudulent conspiracy between Roy T. Wise, the president of the corporation, Will H. Hays and Ambrose N. Diehl. It is found in effect that these three men formed a plan to obtain "without adequate or *any* consideration" (p. 40, top) the patents from the corporation; that the contract of February 27, 1930, was a part of this theft and as to the $75,000.00, it was found that this sum was "to be paid to the respondent from surplus accumulated over the expense of operating such proposed Wise Patent and Development Company, at such times as funds should be available". (p. 38.) The finding as to the promise to pay the $75,000.00 was wholly unsupported. (See modifying contract of September 1, 1930.) (p. 116.) Other provisions of the contract of February 27, 1930, are found which were not pleaded and it is then found that the contract of February 27, 1930, "was modified by two later contracts entered into between said parties on May 8, 1930, and September 1, 1930 (p. 39), and that these contracts are "assets of respondent". (p. 39.) The amended petition had charged "that no consideration was or ever has been received by the respondent for said United States patents". The court found:

> "That the said contract of February 27th, 1930, and all of the transactions arising therefrom and in connection therewith, whereby said respondent and said Will H. Hays, Ambrose N.

Diehl and Roy T. Wise, had acquired *without adequate or any consideration* were *by respondent and said parties concealed* from the creditors of said corporation *and from its stockholders, other than Roy T. Wise;* that to effectuate said concealments said respondent and said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, falsely represented *to said creditors and stockholders, that the said patents had been disposed of for the sum of $25,000.00; that in addition to the concealment of said contract and the transactions arising therefrom and in connection therewith, said respondent and said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, further concealed from said shareholders and said creditors of respondent, any possible causes of action against Will H. Hays and/or Ambrose N. Diehl and/or Roy T. Wise, and/or against Wise Patent and Development Company arising out of said contract and/or for the setting aside of said assignment of said patents to Wise Patent and Development Company and/or for damages resulting from the fraudulent acts of said parties, Will H. Hays, Ambrose N. Diehl and Roy T. Wise, in acquiring and converting to their own use, the assets of respondent without adequate or any consideration therefor."* (pp. 39, 40.)

The above findings are supplemented by a further finding numbered VII, as follows:

"VII.

The court further finds that this entire case and the transactions above set forth, on the part of said respondent, and said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, are tainted

with fraud and concealment *and warrant a full and complete investigation through the processes of the bankruptcy court.*" (pp. 41-42.)

The findings were prepared by the other side. No criticism is implied in this statement. These findings do show that the learned trial court, at the invitation of petitioners, construed their amended petition as charging that a conspiracy or fraud was practiced upon the corporation to get its patents and that the contract of February 27, 1930, was but a part of this fraud and that the rights resulting to the corporation were its valuable assets and that it was these rights which were fraudulently concealed; that it was not simply a case in which the corporation had taken a contract to which it was entitled because its property was used as the consideration therefor. The findings proceed on the theory that there was fraud not only in the transfer of the patents but also that there was fraud in concealing the deal involving the transfer of the patents. It is clear that the trial court based its order upon the lengthy finding as to fraudulent practices which were not alleged. The court's attention is called to Finding V, which reads as follows:

> "That all of the aforesaid acts of concealment of assets of the respondent, continued from the time of their original commission up to within four (4) months of the filing of the original and amended petitions herein, and the original and amended petitions herein were filed within four months from the discovery of the above mentioned acts of concealment of assets by respondent.
>
> That the aforesaid assets of respondent were concealed as aforesaid with the intent to hinder,

delay and defraud the creditors of respondent." (p. 41.)

The court's finding on the concealed bank deposit is Finding (b) of paragraph V, pp. 40, 41), as follows:

> "(b) That the said respondent through its President Roy T. Wise, during the months of June, July and August, 1931, caused to be sold and did sell certain tools, machinery and equipment belonging to said respondent to persons unknown; that respondent received the approximate sum of six hundred twenty ($612.00) dollars, from said sales; that said sum of six hundred twelve ($612.00) dollars *was an asset* of respondent, which on or about the month of August, 1931, was concealed by respondent depositing the same in the West Berkeley Branch of the Bank of America, Berkeley, California, in the name of one H. Jacobson, an employee of respondent." (pp. 40, 41.)

The court will thus note that the trial court does not find that this bank deposit "is" an asset of the respondent. In other words, the finding is consistent with the erroneous theory hereinbefore mentioned that there can be concealment without concealed property. The point here made should be considered at once for if we are wrong in saying there was no evidence of fraudulent concealment of any kind and no evidence of concealment within the four months period, the work of considering lengthy evidence on the other branch of the case is avoided. So we take up our Point I out of the usual course.

POINT I.

THERE WAS NO FRAUDULENT CONCEALMENT OF THE BANK DEPOSIT. THERE WAS NO CONCEALMENT OF SUCH PROPERTY WITHIN FOUR MONTHS OF THE FILING OF THE ORIGINAL PETITION OR WITHIN FOUR MONTHS OF THE FILING OF THE AMENDED PETITION.

Possibly it can be stated that if a corporation deposits money in the name of another person to prevent its being attached, there is a technical concealment with a view to hindering, delaying and defrauding creditors. We do not concede that such hiding of assets is an act of bankruptcy unless the intent is to defraud creditors. And clearly something more is required than merely proving that the depositing of the money in the name of another is with the view to preventing attachments. We do not concede that this is a departure from the secrecy and privacy with which any individual is entitled to transact his business. There was no admission and there was no proof that Roy T. Wise as president of the corporation, or any other officer of the corporation, handled the deposit as it was handled with a view to cheating or defrauding any creditor. There is secrecy in practically every preference. It was urged by the learned counsel for petitioners that concealment was a continuing offense. We pointed out the rule that concealment is not a continuing offense when the asset concealed has ceased to exist or has been disposed of by a preference or transfer. The learned trial judge adopted the theory of the other side.

The witness, F. W. Peters, was upon the stand and he was about to be questioned by counsel for peti-

tioners for the purpose of obtaining admissions from Roy T. Wise who had been the president of Wise Manufacturing Company as to this bank deposit of $605.00. (p. 75.) We interrupted to ask whether the facts could not be stipulated to. We stated that we had a letter from Miss Jacobson who was the H. Jacobson or Huldur Jacobson mentioned in the petition, showing her withdrawal of the final balance of the account in the West Berkeley Branch of Bank of America and her charging of this balance with a salary claim of approximately $350.00; that this letter was addressed to attorneys Clark, Nichols & Eltse, and that this letter claimed that she had this bill for unpaid secretarial services. We further stated that we had a letter from Mr. Sorrick, the Manager of the Berkeley Branch of the Bank of America, which showed the closing of this account in November, 1931. (p. 75.) Counsel asked to be shown this letter (p. 76) and stated that he was not interested in the letter from the lady "because I think that you should have her here". We stated that we could give the exact deposits; that we had the letter covering this from Mr. Sorrick, the bank manager. Counsel then stated that he would go ahead and make the stipulation that he was willing to make. The attorneys then stipulated that the account was opened in the name of Huldur Jacobson on June 25, 1931, the total deposits being $612.00; that the account was closed on November 23, 1931, by the withdrawal of the balance which existed at that time, namely, $430.00; that the funds that went into the account were derived from the sale of small tools belonging to the

corporation; that the funds were put into this account in the name of Huldur Jacobson to avoid their being attached by the creditors of the corporation.

The balance of the stipulation and evidence on this issue was as follows (pp. 77 to 81):

"Mr. Resleure. And will you further stipulate, as your answer indicates, that the object in putting this money in the name of Huldur Jacobsen was to prevent any of the creditors of the Wise Manufacturing Company ascertaining the existence of these funds and making possible attachment thereon?

Mr. Clark. Well, it was the usual practice of putting funds in there to avoid their being attached. We so stipulate; the funds put in the name of Huldur Jacobsen; deposits put in her name to avoid of it being attached by the creditors.

Mr. Resleure. And will you further stipulate that these funds were concealed from creditors and from all other persons by the respondent in this manner, having the account in somebody else's name?

Mr. Clark. Well, I think the Court can draw its conclusion that it was a practice perhaps to be condemned. I do not want to stipulate to that conclusion.

Mr. Resleure. All right.

Mr. Clark. Now, that I have stipulated to that, will you not stipulate that the account was closed, as indicated by that letter sent by Huldur Jacobsen?

Mr. Resleure. No, I am afraid I cannot go that far, much as I would like to return your courtesy. I would like to have Miss Jacobsen,

who is a former employee, here to cross-examine her as to what happened to these funds.

Mr. Clark. *Paid out all of them down to that point, under the direction of Mr. Wise.*

Mr. Resleure. *We will stipulate that the funds were paid down to $184 on November 28th, at the direction of Mr. Wise.*

Mr. Clark. That is right.

Mr. Resleure. That is what you want.

Mr. Clark. Yes; that is right, $184.45.

Mr. Resleure. Apparently this conflicts—But we will let our stipulation stand.

Mr. Clark. She was written to for the balance of the money, and she was then down at Turlock. Instead of sending the balance of the money,—$530,—and the bank records show it, she had the account transferred to herself at Turlock,—the balance of $530. She then sent a letter to Clark, Nichols & Eltse, reciting that she had withdrawn from the account $345.55 unpaid salary, salary earned prior to April 18, 1931, leaving a balance of $184.45. She enclosed the check to us for that amount. The bank records show she withdrew the $530 on the date indicated in the other letter from which you were reading——

Mr. Resleure (interrupting). $430——

Mr. Clark (interrupting). Well, that is a clerical mistake. May I correct that? That is just Mr. Sorrick's stenographer's clerical mistake.

Mr. Resleure. Yes, go ahead, stipulate it was $530.

Mr. Clark. Yes, $530.

Mr. Resleure. In my original stipulation—In other words, in the first stipulation that I narrated, the amount that I stated of $430, being the balance on hand, should have been $530, and

the mistake was due to a clerical error in the letter.

Mr. Clark. I think our stipulation is perhaps unfinished. *You stipulate the lady did withdraw the $530 as indicated by Mr. Sorrick, or do you want me to call him over here? It is useless.*

Mr. Resleure. *Yes, we will admit the $530 was withdrawn.*

Mr. Clark. By Huldur Jacobsen?

Mr. Resleure. All right; by Huldur Jacobsen.

Mr. Clark. And that she kept $345.50 of it, and remitted the balance to Clark, Nichols & Eltse. This letter shows it.

Mr. Resleure. Well, I think we are in hopeless confusion with the stipulation. The letter, as a matter of fact, shows she sent you a check for $184.45.

Mr. Clark. That is what I said.

Mr. Resleure. But she did not withdraw the entire $530.

Mr. Clark. No. Get this: The account was deposited in the West Berkeley Branch of the Bank of America. She was a clerk of some kind in the Wise Manufacturing Company. She moved to Turlock. When she was requested to remit the balance of this particular account which was deposited in her name, she saw a lawyer—she indicates in her last paragraph she had seen a lawyer—and the bank records show she called for $530 to be sent to the Bank of America, the branch at Turlock; and she then sent to us a statement showing that she had taken from the $530, $345.55, and she remitted to us the balance.

Mr. Resleure. *All right. We will stipulate to everything that Mr. Clark says, except we won't*

stipulate that the $184 went to pay attorneys' fees, and we won't stipulate that the $345.55 went to pay prior salary. You can testify, yourself, as to that.

Mr. Clark. I have been trying to aid you by stipulating to records. Do you want me to take the deposition of Huldur Jacobsen?

The Court. I think you gentlemen will be able to agree on that.

Mr. Clark. *She took the money, we never have been able to collect it.*

Mr. Resleure. *All right, we will agree to it.*

Mr. Resleure. *Yes.*

Mr. Clark. *At that time, November 28, 1931.*

Mr. Resleure. Well, let me see? Where is your other letter—*Yes, approximately that time.*

Mr. Clark. All right."

The witness Peters continued:

"I know that Mr. Wise told me the money (referring to the money mentioned in the foregoing stipulation) was deposited in Miss Jacobsen's name, *and he told me also that she had withdrawn the greater part of it to pay her salary.*"

Peters was their witness. This was their proof.

Concealment ceases to be an act of bankruptcy when the property concealed ceases to exist. This is evidenced by the rulings that where there is concealment in connection with the transfer made with a view to hindering, delaying or defrauding of creditors, the act of bankruptcy which the law permits a petitioner to rely upon is the transfer. The bank deposit here

was all used up and paid out in 1931. The original petition was filed March 30, 1933.

Citizens Bank v. W. C. DePauw Co., 105 Fed. 926;

Revis v. U. S., 9 F. (2d) 496.

It is not pretended that Wise pocketed any of the bank deposit and that he was holding it within four months of the filing of the petition. The law does not mean that a creditor can have a corporation adjudged bankrupt upon a petition filed in the year 1934, if the creditor discovers that in 1924, the corporation deposited in the name of a third person and with a view to preventing attachments, the sum of $100.00, and later in the year 1924, lost the money or withdrew it and used it in its business.

It is of course conceded that concealment is a continuing offense and that it continues up to the time of discovery.

Citizens Bank v. W. C. DePauw Co., 105 Fed. 926;

In re Havens, 255 Fed. 478.

But this does not mean that the act can continue forever without a subject matter to which it relates. *As we have indicated, the findings which were prepared by the other side are simply silent on allegation and denial that the money deposited "is" the property of the corporation.* The finding is that the $612.00 *"was an asset"* concealed *"on or about the month of August 1931"*. (pp. 40, 41.)

STATEMENT OF CASE WITH RESPECT TO CONCEALMENT OF FRAUD IN TRANSFER OF PATENTS.

We shall first refer to condition of Wise Manufacturing Company in 1929 and next to the facts with which it is claimed the alleged concealment occurred.

The court will note that many of these facts were developed on cross-examination. After endeavoring to show a fraudulent obtaining of the company's patents and that Wise pretended they had been sold for $25,000.00 and had thereby accomplished concealment of the fraud, petitioners confined their case to showing that Mr. F. B. Cerini, the attorney, who filed the original petition (p. 5) for the petitioning creditors did not know of the existence of the contract of February 27, 1930 "until the first week in March 1933" (p. 82, Cerini) and that the making of this contract was ascertained at this late date only as the result of visits, beginning in October, 1932, to Wise's house in Berkeley by attorney F. W. Peters, who had been employed by Franklin Palm and certain other preferred stockholders of Standard Die & Tool Company (which owned most of the stock of Wise Manufacturing Company) to investigate a case which Palm had brought for the preferred stockholders and "report back to the preferred stockholders". (p. 43, Peters.)

It is claimed that the concealment of the fraud practiced and of the contract of February 27, 1930, is made out by proof of admissions in conversations which were had with Wise and by proof of conduct of Wise on the occasion of these visits, taken in connection with certain facts which were put before the court in the direct

testimony of witnesses Peters, Palm, White and Olin. The cross-examination and records offered by appellant placed before the court additional facts. It will aid the court if these facts are rearranged and presented in a chronological order. And this we shall endeavor to do. But we will state here our additional points so that the court may have them in mind in stating the case as presented by the evidence.

APPELLANT'S ADDITIONAL POINTS.

Appellant makes the following additional points for reversal:

POINT II.

THERE WAS NO CONCEALMENT WITHIN THE FOUR MONTHS PERIOD OF THE ALLEGED FRAUDULENT TRANSACTIONS OF WHICH THE CONTRACT OF FEBRUARY 27, 1930, IS ALLEGED TO BE A PART. THE COURT WILL NOTE THAT AT THE INVITATION OF PETITIONERS, THE TRIAL COURT TREATED THE AMENDED PETITION AS CHARGING AND PETITIONERS PRESENTED THE CASE ON THE THEORY THAT THE CONTRACT OF FEBRUARY 27, 1930, WAS A PART OF A FRAUDULENT CONSPIRACY AGAINST THE CORPORATION AND THAT IT DID NOT SIMPLY REPRESENT AN ASSET FOR WHICH IT HAD PROVIDED THE CONSIDERATION AND WITH WHICH IT WAS SATISFIED AND WITH WHICH ITS CREDITORS HAD TO BE SATISFIED. THE FINDINGS ARE, IN EFFECT, THAT THE COMPANY'S PATENTS, WHICH WERE ALLEGED TO BE THE ONLY PROPERTY OF SUBSTANTIAL VALUE WHICH THE CORPORATION OWNED, WERE FRAUDULENTLY SUBJECTED TO

THE ARRANGEMENT REPRESENTED IN PART BY THE CONTRACT OF FEBRUARY 27, 1930, AND WERE FRAUDULENTLY PLACED IN WISE PATENT AND DEVELOPMENT COMPANY; THAT THIS HANDLING OF THE PATENTS HAD CAUSED GREAT DAMAGE AND THAT THE LEGAL SITUATION IS SUCH AS THAT, (A) POSSIBLY THE CONTRACT MAY STAND AS A CORPORATE CONTRACT, WHOLLY OR IN PART, AND DAMAGES BE RECOVERED, OR (B) THE CONTRACT MAY BE DISREGARDED AND A CONVERSION CAN BE CLAIMED, OR (C) IF THE CORPORATION SO DESIRES, A RESCISSION CAN BE CLAIMED AND THAT THESE TRANSACTIONS WERE FRAUDULENTLY CONCEALED FROM SHAREHOLDERS AND CREDITORS. THUS AT THE INVITATION OF PETITIONERS, THE TRIAL COURT CONSTRUED THE AMENDED PETITION AS CHARGING A FRAUDULENT DEALING WITH THE PROPERTY OF THE CORPORATION AND THAT THE CONTRACT OF FEBRUARY 27, 1930, WAS BUT PART OF THE PLAN. WITHOUT CONCEDING THE FRAUD OCCURRED, IT IS CLEAR THAT IF IT DID OCCUR, DISCOVERY OCCURRED LONG PRIOR TO FOUR MONTHS BEFORE THE FILING OF THE ORIGINAL PETITION.

POINT III.

THE FINDINGS ARE OUTSIDE THE ALLEGATIONS OF THE AMENDED PETITION. THE EVIDENCE FAILED TO SHOW THE CONTRACT OF FEBRUARY 27, 1930, WAS THE CONTRACT BETWEEN WISE, HAYS AND DIEHL. IT HAD BEEN VARIED IN SUBSTANTIAL PARTICULARS BY THE TWO LATER CONTRACTS OF MAY 8, 1930, AND SEPTEMBER 1, 1930. THE ONLY POSSIBLE THEORY UNDER WHICH THOSE CONTRACTS, WHICH WERE KNOWN TO PETITIONERS, COULD BE OMITTED FROM THE PETITION WAS THAT THE PETITION CHARGED

AMBIGUOUSLY, OR OTHERWISE, A SCHEME OF WHICH THEY WERE BUT AN INCIDENT TO BE DEVELOPED IN PROOF. AT LEAST THE QUESTION OF DISCOVERY SHOULD NOT BE CONFINED TO THE QUESTION AS TO WHEN ATTORNEY CERINI SAW THE CONTRACT OF FEBRUARY 27, 1930, WHEN PETITIONERS' THEORY IS THAT IT IS BUT A PART OF THE FRAUDULENT PLAN OF MISAPPROPRIATING THE PATENTS.

FURTHER STATEMENT OF THE CASE AS TO POINTS I AND II.

The pleadings evidence and the recitals in the contracts introduced in evidence showed that prior to 1930, there were two California corporations, the Standard Die & Tool Company and Wise Manufacturing Company, having headquarters in Berkeley. The former company owned about ninety-five per cent of the stock in the latter company and Roy T. Wise owned two-thirds of the stock in the holding company.

Roy T. Wise was the president of and he controlled both companies.

The Standard Die & Tool Company was inactive. The operating company was the Wise Manufacturing Company.

The stock in Standard Die & Tool Company was both common and preferred; in the Wise Manufacturing Company the stock was all common stock. The stock ownership in the two companies was as follows:

Standard Die & Tool Company.

Roy T. Wise	660	shares, common.
Roy T. Wise	5	" , preferred.
Others	34	" , common.
Others	258	" , preferred.

Wise Manufacturing Company. (All common.)

Standard Die & Tool Company	4670 shares.
Others	216 "
Subscribed for but not fully paid	55 "

By the stock purchase plan of contract of the contract of February 27, 1930, options to acquire all the foregoing stock, excepting that owned by Wise and the item of 4670 shares, were to be exercised and the existing creditors of the Wise Manufacturing Company were to be paid. This plan was not fully carried out. About 195 shares of the preferred stock held by others in Standard Die & Tool Company was not taken up and this fact may properly be said to be one of the causes of this action. (The figure 195 shares may be slightly erroneous. The estimate is made up as follows: First, by taking the 80 shares of stock held by those who signed the trust agreement hereinafter referred to (pp. 175, 176) and, next, by taking the statement of the witness Peters as to the stock held by preferred stockholders who were formerly represented by attorney Waddell and who are now represented by Mr. Peters. This stock amounted to $11,500.00. It would make 115 shares. (p. 44.) As the funds ran short, the preferred stock in Standard Die & Tool Company was taken up only in those cases where it was held by a holder of common stock in the company. Assuming that the outstanding stock was all purchased by Wise, it will be observed that over 81% of the stock in the companies became Wise stock.)

Prior to January 1, 1930, Wise Manufacturing Company was heavily indebted. It had a first deed of trust

on its plant for $18,000.00. This deed of trust was foreclosed in the year 1931. The witness, Peters, page 120, explains his ascertaining this $18,000.00 deed of trust. The original petition filed herein, pages 4 and 5, recites that all the company's property has been sold out under security instruments. Olin testified at page 168 that the $18,000.00 deed of trust was unpaid when he signed the $25,000.00 second deed of trust with chattel mortgage provisions, dated May 16, 1930. Peters testified, at page 120, that the company "had no assets whatever other than these patents". In addition the Wise Manufacturing Company was indebted in the sum of $25,000.00 on open accounts or unsecured notes and it will be observed that the so-called fraudulent conspiracy had for its first purpose the paying off of the indebtedness last mentioned.

December 31, 1929.—Company adopted a resolution that it was in distress financially and Wise was trying to raise money to pay off these creditors. (p. 162, Peters.)

January 27, 1930.—Company adopted a resolution reading as follows (p. 103):

> "President Wise discussed conference with Mr. Will Hays on his trip to Los Angeles January 21st to 25th. During conference Mr. Hays telephoned A. N. Diehl, Vice President of the Carnegie Steel Company of Pittsburgh and made a definite appointment for Mr. Wise to discuss the possibility of refinancing, License to Manufacture, or the probability of outright sale. Mr. Will Hays is to act as our counsel in this matter—no definite plan having as yet been determined. At Mr. Will

Hays' suggestion, Mr. Wise is to take 5 HP Westinghouse motor and transmission, together with pony brake, and demonstrate it to concerns as recommended by Mr. Hays.

Motion was made by Mrs. Wise, seconded by Mr. Olin, to give our attorney James E. Waddell authority to use his best judgment in the settlement of our account with the Kidelite Company of Lewiston, Idaho."

February 27, 1930.—Date of contract pleaded. This contract recited that Wise, Diehl and Hays were the parties; that Wise had patented certain devices for applying transmission speeds to induction motors, the patent numbers being given; that Wise had caused the organization of the two California corporations, and that the patents were lodged in Wise Manufacturing Company; that the stock in the two corporations was held as hereinbefore set out; that Wise believes that it will be for the best interest of Wise Manufacturing Company and its stockholders to sell the patents; that Wise had approached Diehl and Hays for assistance in the promotion of the patents; that they had agreed to render this assistance; that Wise Manufacturing Company has expended $50,000.00 in the development of the patents; that Wise controlled the California corporations and can cause the carrying out of the terms of agreement; that a corporation shall be formed under the laws of Delaware called Wise Patent and Development Company which shall take over the patents; that the capital stock of the company shall be 1200 shares; that as to 1000 shares of this stock, one-third of it shall go

to Wise and two-thirds of it to Diehl and Hays, and that 200 shares shall be left in the treasury, it being specified that a certain use may be made of the 200 shares; that Wise will cause the patents to be transferred to the new company; that Diehl and Hays will advance expenses for incorporating the new company. The powers of the new company are provided for and in Par. 7. (pp. 57, 58.) It is provided that after the new company gets the patents it shall develop, market and license the same, and that "from surplus accumulating over the expense of operating" the new company, payment of $75,000.00 will be made to Wise and the California companies for expenditures to date in connection with the development of the patents, together with substantial addition; that it is understood that neither the physical properties nor any of the stock of Wise Manufacturing Company shall be transferred to the new company. In Par. 9 (p. 59), Wise agrees to proceed immediately to procure ninety day options on all of the preferred and common stock of Standard Die & Tool Company and ninety day options on all of the stock of Wise Manufacturing Company, in order to have entire ownership of Wise Manufacturing Company at the time of the transfer of the patents arranged for. It is provided that the consideration for the transfer will be the $75,000.00 and "the issuance of all or any part of the stock as the parties of the second part may elect to the party of the first part, or to the Wise Manufacturing Company, with the understanding that such reassignment of such stock of Wise Patent and Development Company will be

made as that ownership of such stock shall be as outlined in Article 2". (p. 60.)

March 10, 1930.—Company adopted a resolution providing for employment of auditors to prepare a complete list of company's debts. A list was prepared and left at the bank. (p. 104, Peters.) These claims were paid off and certain stock in both companies was taken up through escrow 167 at Bank of America, Berkeley, California. (p. 163, Olin.) The money came from Hays, acting for Wise Patent and Development Company.

March 11, 1930.—This escrow was arranged for through a letter sent by Ralph R. Eltse of the firm of Clark, Nichols & Eltse to First Berkeley Branch, Bank of America. (pp. 130, 131.) Douglas F. Scott, an officer of the bank, testified to this fact and in his testimony he explained that the bank was not permitted to give out any information in regard to the source of this money received by the bank or as to the terms of any contract under which it was received. The witness testified (pp. 131, 132, Scott):

> "The first correspondence we had in connection with the escrow in arranging the agreement was a letter from Mr. Ralph R. Eltse dated March 11, 1930. This letter of March 11, 1930, was received in evidence as Petitioners' Exhibit No. 7. In substance it directed the action of the bank in paying out the moneys which it received to the creditors and to the stockholders. It contained the statement 'We solicit confidence as to all matters contained in this letter.' The letter was signed by Ralph R. Eltse.

Q. Referring to the last statement in the letter, 'We solicit confidence as to all matters contained in this letter'; that came to your attention, did it?

A. It did.

Q. And you observed confidence in regard to that escrow?

A. We did."

The next resolution of the directors of the company, which resolution was signed by one of the petitioning creditors, E. W. Olin, shows an arrangement for borrowing the sums paid to the creditors amounting to $25,000.00. The resolution, dated April 11, 1930, read (p. 105):

"Director Pansy E. Wise read a letter received from Mr. Roy T. Wise, President of this Company, wherein Mr. Wise requested authorization to negotiate in the name, and for the benefit of the corporation, a loan of $25,000 the said sum to be used to satisfy current claims of creditors of this corporation pending sale of corporate assets to Messrs. A. N. Diehl, Will Hays, et al.

It appears from Mr. Wise's letter that some time might elapse before the validation and check-up of patents of The Wise Manufacturing Company involved in the sale.

A resolution was passed, a copy of which is attached hereto and made a part hereof, authorizing the President and Secretary in the name of the Corporation and under the corporate seal to execute a promissory note in the principal sum of $25,000, bearing interest at the rate of not to exceed 8% per annum.

There being no other business before the meeting, the same was on motion made, seconded and carried declared duly adjourned.

ROY T. WISE
President

E. W. OLIN
Secretary"

May 5, 1930.—Standard Die & Tool Company adopted a resolution authorizing the transfer of the patents involved to Wise Patent and Development Company, the Delaware corporation. (pp. 108, 109.)

May 5, 1930.—Standard Die & Tool Company assigned to *Wise Patent and Development Company* the patents and rights to patents described in the contract of February 27, 1930. *This transfer was recorded on May 22, 1930.* (p. 169.)

(It should be stated that the evidence did not show that Wise Manufacturing Company made any transfer of patents to Wise Patent and Development Company. It had been supposed that Wise Manufacturing Company had received a transfer of the patents for stock issued to Standard Die & Tool Company. While the Wise Manufacturing Company owned the patents, the transfer to Wise Patent and Development Company was made directly from Standard Die & Tool Company.)

May 8, 1930.—Contract of February 27, 1930, modified. (p. 109.) The modification recites that with the consent of the parties and since the contract of February 27, 1930, was made, the Delaware corporation has been formed and that its stock is 2500 shares of common stock of no par value and 1000 shares of pre-

ferred stock of the par value of $100.00 per share. (p. 110.) It was provided that 25 shares of the common stock should be issued equally to the three parties as directors and that in addition, each of them should receive 458-1/3 shares and that 200 shares of this stock should be set aside for the special use mentioned in the original contract, provided that all of such 1475 shares of common stock should be issued fully paid and non-assessable in exchange for the patents. (p. 112.) Par. C of the modification (p. 112) provided that no part of the $75,000.00 was to be paid until the parties of the second part, Diehl and Hays, had been reimbursed for advancements made by said parties for the account of Wise Patent and Development Company. Par. D provided that the 1000 shares of preferred stock would be sold as treasury stock at $95.00 per share (p. 113) and that from the proceeds of the sale of this stock the new company would loan to Wise not exceeding $75,000.00 and take as collateral security his stock in the California corporations together with all their assets, and that Wise will further deliver as security his stock in the new corporations. (pp. 113, 114.) It was next provided that in the event of the loan by the new company, Wise shall use the funds in retiring the obligations of the California corporations and in the purchase of the stock of said corporations. (p. 114.) It was also agreed that preferred stock dividends should constitute a part of the expense of operating the new company before anything would be paid on the original $75,000.00 promised. (pp. 113, 114.)

May 8, 1930.—Wise made a transfer of certain patents and patent rights to Wise Patent and Development Company. This was recorded in the Patent Office on May 22, 1930. (p. 169.)

Prior to May, 1930, and at the direction of Wise, options were procured from the stockholders of the Wise Manufacturing Company and the Standard Die & Tool Company whereby M. R. Gilbert or her assignee was given the privilege of purchasing the outstanding stock of these companies. These options were deposited at the First Berkeley Branch of Bank of America in said escrow No. 167. (The options did not cover the Wise stock.)

May —, 1930.—Extensions of these options were requested. (pp. 66, 67.) A circular letter was sent by Eltse to all of the stockholders to obtain these extensions. In this letter it was stated that details had not been completed in connection with the obtaining of advances to be secured from eastern capitalists *for the purpose of liquidating the present outstanding claims of creditors and for the purpose of providing funds to take up the stock under the options. It was stated that the parties making the advances would not close until they had made a thorough examination of the corporations and their assets including the patents and patent applications,* and that approximately ninety days would be required before the patents could possibly be issued on the applications. That the lenders were carefully checking the patent records at Washington. The court will note that this letter certainly suggested to every stockholder to whom it was issued that a con-

tract of some kind was being made whereby the California companies were to be divested of all of their interests in the patents and as is herein explained, it was a condition of the escrow under which the stock was to be taken up that the terms of the contract under which Wise was getting the money were not to be disclosed. At this stage, if stockholders were being defrauded, it was an invited kind of fraud—payment in full for stock in a corporation very badly in debt. Selling the stock meant selling the patents. And how was a creditor to be hurt who was paid in full? The Eltse letter stated:

> "(b). Details have not yet been completed in connection with advances being secured from eastern capitalists, proceeds of which are to be used in liquidating present outstanding creditors' claims and in providing funds to the optionee with which to take up the stock under the options. The parties making the advances will not close *until they have made a thorough examination of the corporations and assets,* including *the patents and applications for patents.* Patents on several of the applications have not yet been issued, and approximately ninety days will be required before the patents can possibly be issued on the applications. The lenders are carefully checking the patent records at Washington.
>
> Unless the requested extension is granted to the optionee it is doubtful if the creditors' claims can be liquidated and it is feared the creditors will take precipitate action which will mean the stockholders will suffer loss.
>
> You are assured and advised that no more money is to be obtained than is necessary to

liquidate the outstanding creditors' claims and to take up the options for the purchase of the stock at its par value.

We solicit your cooperation by the prompt execution and return of the enclosed extension of option." (p. 67.)

It was stipulated that Mr. Sorrick, manager of the First Berkeley Branch of Bank of America, where the escrow was being carried out, asked Eltse as to whether information as to the terms of the contract could be passed out and "Mr. Eltse stated that it was one of the conditions of this payoff as provided with this cash, that the terms of the contract and the parties were not to be disclosed." (pp. 132, 133.) So it is clear that if any creditors or any stockholders were being embarrassed in taking pay at the bank, they were perfectly willing to waive any right that they might have had to a full disclosure as to the terms of the contract which Wise had made. The plan fell down not because they were all not glad to take the money but because the cash advances stopped. *And that occurred in 1930.*

May 26, 1930.—Directors of Wise Manufacturing Company adopted a resolution providing that the company and Standard Die & Tool Company should borrow from Alonzo C. Owens from $25,000.00 to $75,000.00 and secure the payment of the same by a security instrument covering the real and personal property of the company. This resolution was certified to by one of the petitioning creditors as secretary of Wise Manufacturing Company, to-wit, E. W. Olin. (pp. 49, 50.)

May 16, 1930.—The company executed its note for $25,000.00 and its deed of trust with chattel mortgage provisions to Alonzo C. Owens, which security instrument covered the company's real and personal property. (p. 167.) These instruments were signed by E. W. Olin as secretary for the company.

May 27, 1930.—Wise Patent and Development Company sent a check for $25,000.00 to the First Berkeley Branch of Bank of America to be paid out under escrow No. 167, which was the escrow created to pay all of the existing debts as listed by the accountant, Van Dine. (p. 130, Scott.) Lacking a few dollars, the whole of this money was paid out to these creditors. (p. 130, Scott.) The check was signed by Will H. Hays.

(The claims involved in this suit originated after these creditors were paid off.)

June 9, 1930.—Hays sent to the same escrow $1600.00 to be used in taking up the stock of Wm. Roberts and H. G. White in Standard Die & Tool Company. (p. 130, Scott.)

September 1, 1930.—Contract of February 27, 1930, further modified. (p. 116.) This contract specifically provided that the provisions of the agreements of February 27, 1930, and of May 8, 1930, *for the payment of $75,000.00 to the California corporations was cancelled.* In paragraph 2 this modification recited that the new company had made a contract with Westinghouse Electric & Manufacturing Company, under the provisions of which the Westinghouse Electric &

Manufacturing Company had paid the new company $10,000.00 and was given the right to acquire an exclusive license to manufacture under the patents for the sum of $25,000.00, to be paid; that Wise shall receive the $10,000.00 and that if any of the $25,000.00 is paid, Wise shall receive the payment, but that these payments shall be credited on sums owing to Diehl and Hays, or to Wise Patent and Development Company, or to Alonzo C. Owens of Sullivan, Indiana, but that said credits should not be given until such time as payments would have been due to Wise under the two prior contracts had this agreement not been made and until liability of the three parties has terminated on a $40,000.00 note given to Westinghouse Electric & Manufacturing Company on August 30, 1930. (p. 119.)

September 2, 1930.—Hays sent an additional $16,-623.02 to the bank to be used in escrow No. 167 to exercise the options to take up more of the common stock of Standard Die & Tool Company. (p. 131, Scott.)

September 11, 1930.—An additional $1100.00 was deposited in the escrow to take up the stock of Dubendorf and Wilke. (p. 131, Scott.)

September 13, 1930.—An additional $1000.00 was sent to the escrow to take up the stock of J. J. Earle. (p. 132, Scott.)

As is next shown by the testimony of Halsey J. White, who was called as a witness by petitioners, it was thoroughly understood that Wise, who was directing the whole process of paying off these creditors and

the taking up of this stock, refused to give out what he was getting or the terms of the contract under which the money was being provided. *White, who had interested various people in the corporations and who actually undertook to act for several of the stockholders, exacted of Wise as the price of his remaining silent $200.00 a share for his stock instead of $100.00 a share, which was paid to and accepted by the other holders of common stock in Standard Die & Tool Company.* He told Wise that he was not getting information as to the contract which was being made for the disposal of the patents, and he explained *that he understood Wise was getting $1000.00 a month as an employee of some sort and that he proposed to block the deal unless they paid him $200.00 a share.* This man who acted for others was an officer in the investment department of the bank (p. 146) and it would seem to be absurd to say that he did not know Wise, the president, was not making a contract with the company's patents which provided an interest in his favor. We quote Mr. White's testimony, directing the court's attention to the fact that it relates *to a period almost three years before the petition in this case was filed* (pp. 148, 150):

> "I received for my stock the equivalent of $200.00 a share. That was paid me as testified by Mr. Scott yesterday, coming from Mr. Hays in the form of a check for $1600.00, $1000.00 of which was used to take up my stock. When I asked Wise what had become of the patent and what consideration if any there was, he just could not give me the details. I asked him what the

status of the company would be and its patent and he made no answer. I questioned him several times in this regard, always with the same result. At one time he stated that he was not at liberty to disclose the information or something of that sort."

Cross-Examination of Witness, White.

"It was approximately June, 1930, when I received my money for my stock. Some of the preferred stock was taken up from stockholders who also held common stock. Practically all of the preferred stock was not taken up. Then these preferred stockholders began to complain and among them was Mr. McMahon and other stockholders with whom I was acquainted. There were numerous complaints. I complained very much myself at the way it was being handled. I told Mr. Wise that because of the fact that he would not disclose the facts of his deal, I thought it was unfair to the stockholders, both preferred and common. The set price was $100.00 a share. To my knowledge no one ever asked me, and I never disclosed to anyone that I got more than the $100.00 a share. To my knowledge I am the only one that got more than $100.00 a share. My position there at the bank was agent of American Investment Company affiliated with the Bank of America." The witness was asked by Mr. Clark if one of the factors that contributed to his being able to get $200.00 a share for his stock instead of $100.00 was that by reason of his position in the bank he knew what was going on. The witness replied that there was a great deal going on at the bank that he had no access to.

Q. And of course you knew the patents were being transferred?

A. Oh, no.

Q. You knew that someone was putting up a lot of money there at the bank didn't you?

A. *It was my supposition that a deal was being made for Mr. Wise* who, it was reported, was receiving $1000.00 a month salary. I knew that a great deal of money was being put up there in the bank and that it was coming from Mr. Hays. Although I was an employee there in the bank, I had no access to these escrow files so as to know that the money was coming from Mr. Hays nor did Mr. Wise tell me that the money was coming from Mr. Hays. The final information I had on that subject came at a time when I by chance saw Mr. Hays's check for $25,000.00. I could not say how long after the check arrived it was that I saw it. I did not *at first* hear of Mr. Hays's connection. I presumed this money would go out to the great batch of creditors very shortly after I saw the check although I saw nothing of the disposition.

Q. You were a common stockholder in this company and you knew that the creditors were filing into the bank and they were getting their money?

A. I assumed that they would get their money.

Q. *It was common information then that at the time these contracts were being made, that instead of defrauding the creditors, all the creditors were going to be paid?*

A. *I believe that is correct.* No list of creditors was ever submitted to the common stockholders to show whether these creditors were paid off at that time. I complained to Wise about his with-

> holding information about the transaction between himself and the other parties interested and stated that in the absence of information *I felt that I would rather not see the deal go through,* that I preferred to hold my common stock as I believed that it had a value in excess of $100.00 a share."

So it was clear to everyone over two years before this proceeding was begun that Wise, though named the president, took a position adverse to the corporation, repudiated his trust: "It was my supposition that a deal was being made for Mr. Wise", etc. In acting adversely to the corporation, he was no more the corporation than a stranger would have been—in the absence of proof that the corporation ratified his acts. Petitioners here contend and obtained findings which are the very opposite of that.

The Wise Manufacturing Company continued to do business at its place of business in Berkeley, California, and it incurred additional debts and it again became in need of funds.

Alonzo C. Owens of the office of Hays & Hays held the deed of trust with chattel mortgage provisions securing the $25,000.00 note and he was requested to release his chattel mortgage so that another first chattel mortgage could be put on the personal property in order to raise $5000.00 to meet additional creditors' claims. The exact date in 1930 when this waiver was requested and was granted does not appear, but the fact that the waiver was requested and that the request was granted by Owens appears at two places in the transcript. (See pages 122 and 165.) But the money could not be obtained.

Counsel may urge that Hays, Wise and Diehl were tainted with fraud but surely at this stage, Hays and Diehl, acting through Owens were not altogether arch criminals towards these creditors.

December 26, 1930.—The stockholders (as they had become) in the Wise Manufacturing Company signed an approval of the transfer of the patents to Wise Patent and Development Company. This appeared on the minute books of the two companies. (p. 46, Peters.)

Part of the preferred stock in Standard Die & Tool Company was not taken up and these stockholders claimed they had been wronged.

April 3, 1931.—Wise tried to appease the preferred stockholders, who were bitterly complaining that they had been defrauded, by tendering a declaration of trust to Bank of America and requesting the bank to hold the stock in the Wise Patent and Development Company, which he had obtained, in trust for the purpose of paying the par value of their stock to the preferred stockholders in Standard Die & Tool Company. The payment intended was to be made to those who were not paid through the escrow. (pp. 133, 134 and 135 to 145.) W. P. Woolsey accepted the position of trustee under this declaration of trust, and about forty per cent of the preferred shareholders whose stock was not taken up accepted it. (Signatures, pp. 175, 176.)

Obviously this transaction showed that the shareholders claimed that Wise had wronged the company

by taking its assets while president. On no other theory was there a claim to be adjusted.

April 29, 1931.—Olin, former secretary of the company, and Sites, two of the petitioners herein sue the company. (p. 168.)

May 1, 1931.—Wise Manufacturing Company's right to do business in California was suspended for failure to pay its state franchise tax. (p. 45.)

June 5, 1931.—Frank L. Hain, substituted trustee under the deed of trust with chattel mortgage provisions that had been given to Alonzo H. Owens to secure $25,000.00, foreclosed said instrument and the mortgaged property was sold to Alonzo H. Owens for $12,000.00. (Transfer, p. 170.)

From that day the Wise Manufacturing Company did no business.

(The real property had already been sold out under the $18,000.00 deed of trust.)

November 30, 1931.—Franklin C. Palm for himself and other preferred stockholders in Standard Die & Tool Company brought suit against Hays, Diehl and Wise to set aside the whole deal with the Wise Patent and Development Company alleging that these three men had obtained in equal shares all the stock of the latter company and

> "That the said transfer of the said patents, business, and assets of said Standard Die & Tool Company and said Wise Manufacturing Company dated on or about March 5th, 1930, *was and is a fraud* upon the preferred stockholders named in Paragraph 9 and upon plaintiff." (p. 93)

January or February, 1932.—Olin and Sites obtained judgments in the cases which they brought against the corporation. (p. 168.) These judgments are pleaded in the petition. (p. 8.)

The attorney for these parties was Mr. Waddell (p. 168) who had been a director of and attorney for Wise Manufacturing Company and the man who prepared its minutes. (p. 169, bottom of page.)

We set out the assignment of errors relied on and proceed with the argument of Points II and III.

Assignment of Errors.

"4. The court erred in finding and determining that respondent concealed an asset or item of property of respondent in that it concealed the so-called contract of February 27, 1930, the fact appearing that the said contract was changed in vital particulars and superseded by later written contracts executed by the same parties, with respect to the same subject matter.

7. The court erred in finding and determining that concealment from the creditors of respondent of the contract mentioned in Paragraph V(a) of the amended petition occurred within four months prior to filing of the original petition on March 30, 1933.

8. (Repetition except reference is to filing amended petition.)

9. The court erred in refusing to find and hold that the contract of February 27, 1930, mentioned in Paragraph V(a) of the amended petition was not the contract under which the patents therein referred to were transferred and held.

10. The court erred in refusing to hold and determine that the petitioning creditors did have knowledge of the making and existence of the contracts which represented the arrangements under which the patents referred to were transferred more than four months prior to March 30, 1933.

11. The court erred in finding and determining that respondent could be adjudicated a bankrupt and in adjudicating respondent a bankrupt for concealment of property or for wrongs other than those charged in Paragraphs V(a) and V(b) of the amended petition.

13. The court erred in finding acts of concealment and wrongdoing on the part of the respondent which were entirely outside of what was alleged in the amended petition, and in basing the order of adjudication thereon. Nothing but the contract of February 23, 1930, is referred to in Paragraph V(a). The evidence showed that that contract did not exist, that it did not represent the arrangement under which the patents were held. The allegation that said contract was an asset of the respondent was untrue.

14. The court erred in finding and determining that concealment from the creditors of respondent of the property mentioned in Paragraph V(b) of the amended petition did, in fact occur.

15. The court erred in finding and determining that concealment from the creditors of respondent of the contract mentioned in Paragraph V(b) of the amended petition occurred within four months prior to the filing of the original petition of March 30, 1933.

16. (Repetition excepting reference is to time of filing amended petition.)

17. The court erred in refusing to find and to hold that over a year prior to the filing of the amended petition the bank deposit and moneys referred to were used up and ceased to be an asset of the respondent corporation.

18. The court erred in making an order adjudicating respondent a bankrupt.

19. The court erred in finding and determining that respondent had concealed its property from its creditors with a view to hinder, delay and defraud them and within four months prior to the time of filing of the original petition herein on March 30, 1933.

20. (Repetition except reference is to filing of amended petition.)

21. The court erred in overruling the preliminary objections made to the taking of testimony as to declarations or statements made by Roy T. Wise, upon the ground that the said Roy T. Wise did not have authority to speak for or bind the respondent by his statements or admissions. The objections referred to were, with the consent of the court, made at the very outset of the taking of the testimony of the witness Peters. The objections were repeated from time to time, and they were all overruled. The objections referred to were those objections which went to the whole of the testimony of the witnesses to the declarations or statements of Roy T. Wise, offered for the purpose of showing the respondent had concealed the execution of the contracts under which the patents referred to were transferred." (pp. 182, 183, 184, and 185.)

POINT II.

This point briefly is that if the fraud claimed occurred, it was not concealed to a point of time within four months of the filing of either the original petition or the amended petition. (See page 18.)

Obviously, if the amount of money had been obtained which it was expected would be obtained, all the creditors of the Wise Manufacturing Company would have been paid off and all of the stock of the two California Companies would have been taken up. That, apparently, was the intention at the outset. But the plan broke down and only such of the preferred stock in the Standard Die & Tool Company as was held by stockholders who held common stock was finally taken up through the escrow. This left about 195 shares of stock in Standard Die & Tool Company outstanding. That is about 20% of that company and that company owned about 94% of the Wise Manufacturing Company. There was thus a failure to purchase about 19% of the Wise Manufacturing Company.

It was testified at length by the witness, Peters, that Wise and Hays and Diehl had finally figured that it would not be necessary to take up the preferred stock of Standard Die & Tool Company because the preferred stock had no voting rights. Douglas Scott, who for the bank had charge of escrow No. 167, explained that the preferred stock was not all taken up and he explained that prior to April 1931, these preferred stockholders were complaining and that in April 1931, Wise had sought to satisfy

them by executing a declaration of trust covering his stock in Wise Patent and Development Company and that the bank had refused to act as trustee. Scott testified (pp. 133, 134):

> "I remember that in April 1931 there was tendered to the bank a declaration of trust, executed by Roy T. Wise. I have a letter with me, dated April 3, 1931, sent by Clark, Nicholas & Eltse. At that time there had been grumbling by the preferred stockholders, who had not gotten their money. I presume they had anticipated they were going to get their money. I remember there were more options put up than were taken up —a lot more. These preferred stockholders were complaining, and they were inquiring of me, because they had not gotten their money. This escrow was completed in the year 1930 as far as paying out the money was concerned. It was not completed in so far as taking up all of the options were concerned, a certain number of the options for the stock had been held until the period of time had more than expired and the stockholders were requested to withdraw their stock. All of the common stock of the Wise Manufacturing Company was taken up and paid off, excepting common stock owned by the Standard Die and Tool Company, the old parent company. I cannot answer for sure that all of the common stock of the Standard Die and Tool Company was taken up but I think it was all taken up. In addition some of the preferred stock of the Standard Die and Tool Company was taken up. We had a long list of stockholders who were perfectly willing to take their money if it was paid by Mr. Hays. However, he quit sending money so the options could not be exercised. This

all occurred in 1930. I know that there was discontent on the part of the stockholders who had not received their money.

Q. And *there was discontent, also, wasn't there, about what Wise was getting out of it?* Wasn't that *pretty noisily* kicked about in Berkeley and in the bank?

A. *Yes, it was, yes.*

Q. *It was plenty strong that Mr. Wise had some sort of a contract in which he was getting some sort of a nice profit out of it, wasn't that said?*

A. *I cannot remember it was actually said, but it was intimated.*

Q. *Rather strongly from these stockholders, in 1930?*

A. *Yes.*"

Peters in his investigation questioned Wise as to why the balance of this preferred stock was not taken up and Peters testified that Wise had said that they had been of the opinion that this stock had no voting rights and that it would not be necessary to acquire this stock and he also testified that Wise had explained that only $40,000.00 had been obtained from the Westinghouse Company in a deal with that company whereby the latter company took a license under the patents. This money, as shown by the testimony of Peters and by the letter of Alonzo H. Owens to Wise (our Exhibit B, page 84) had been used in part to take care of some of the advances of money paid out by Scott through the escrow No. 167. (pp. 130, 131.) (The total given by Scott is $60,623.02 at page 131. The items given by him aggregate but $45,323.02.

The letter page 84 shows, however, the advancing of $21,277.08 in excess of what went for common stock and to the company's creditors. In the $21,277.08 is $6742.53 paid other than through Scott for preferred stock.) Peters testified (pp. 96, 97):

"He showed me that letter in answer to my inquiry as to what had happened to the $40,000.00. That letter accounted for the $40,000.00. That letter is Respondent's Exhibit 'B'. They did renew the $40,000.00 note to the Westinghouse Company. He did not say to me that the note had been renewed for an amount which was the original amount less royalties, and that the royalties were less than $1000.00. He merely told me he had renewed the note under the pressure of the Westinghouse Company, and that they were going to refuse to renew the note any longer and were pressing Mr. Hays and Mr. Diehl.

Q. Did he not also say this: that when they made the contract, they thought the returns from the royalties would be so great that it was understood between Westinghouse Company and these three men that one-half of the royalties would go to the Patent Company, the Wise Patent & Development Company, and the other half should be applied on the note? Didn't he say that?

A. He told me that was the original agreement, and he expected the royalties to pay off the note within two years.

Q. Didn't he say this to you, too: that the royalties had been so little that the Westinghouse Company had insisted that the whole of the royalties be applied on the note which was renewed?

A. He said they had been reduced, and because no—*no payments had been made on the*

principal—and that they had insisted on the renewal of the note, and that all royalties be applied to the note.

Q. In other words, they were not prepared to pay off the note when its due date arrived, they got it renewed, and that Westinghouse Company insisted that all the royalties that came in on this contract should be applied on that note?

A. Yes." (pp. 96, 97.)

Sad to say, it was still wholly unpaid when this trial occurred.

Not a word of evidence was offered as to whether petitioner Berkeley Pattern Works did or did not know of the contract of February 27, 1930.

By every principle of law and common sense, Olin and Sites were, more than four months prior to the filing of the original petition herein, charged with knowledge that Wise, the president of this corporation, had made a private contract through the use of the patents of the corporation and were charged with knowledge that this contract was to yield him personally an undisclosed profit. They had actual knowledge of the substance of the deal he made.

The very records of the court wherein this case was tried showed Waddell knew, and he had his client Palm swear, that Wise, Hays and Diehl had cooked up a scheme to get the patents *wrongfully and that they had made a contract to divide* the stock of Wise Patent and Development Company ⅓ to Wise, ⅓ to Hays and ⅓ to Diehl and that the deal was a fraud on the rights of the unpaid shareholders. Waddell was attorney for *Olin* and *Sites*. Palm sued for himself

and for other preferred stockholders in Standard Die & Tool Company, to-wit: Henderson, Chapman, Carney, Christensen and Huff. They had not *seen* every term of these contracts made by these three men and would not have understood them if they had, but they and their attorney claimed in plain terms that the transfer of the patents was wrongful and that it was a fraud *and that the whole patent transfer should be set aside.* (Palm Complaint, pp. 87 to 94.)

To "know" a conspiracy to take patents, it is not at all essential that the injured party shall know the hundred and one minor oral or written agreements the conspirators may make. The essence here of the crime charged was that the patents were the only property of substantial value of the corporation; that on February 27, 1930, Wise, though president, agreed in a private capacity with Diehl and Hays to get the patents into the Wise Patent and Development Company; that he pretended they were sold for $25,000.00;

> "* * * that to effectuate said concealments said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, falsely represented to said creditors and stockholders, that the said patents had been disposed of for the sum of $25,000.00."
>
> Finding V (a). (p. 40.)

And Peters testified to that as coming from the lips of Wise in 1933. He was investigating for shareholders. (p. 70.)

And Olin testified, speaking of the men in the shop:

> "The impression we all had was that the patents were sold for $25,000.00." (p. 162.)

Now, Palm and his attorney Waddell knew this was false in the year 1931 and Waddell was then attorney for Olin and Sites and no one testified for the third creditor Berkeley Pattern Works. They knew—if it was ever stated—that this transfer was no pure sale for $25,000.00 which went to Wise Manufacturing Company. If that were true, what earthly right had they to sue Hays, Diehl and Wise? What right had they to call for Wise's stock as provided in the Declaration of Trust?

The Court will note that the investigation undertaken by the witness Peters which lead to these proceedings did not begin until October 1932 (p. 43, Peters) and that this investigation was over two years after the patents involved had been transferred and the transfers thereof recorded and that his investigation occurred about a year and a half after the property of the Wise Manufacturing Company had all been sold out and it had quit business. With everyone knowing what had become of the patents and that a corporation with a significant name had been created, which had received the same, to-wit: Wise Patent and Development Company, Mr. Peters starts his investigation as if he could discover this fact. He visited Wise in Berkeley at intervals starting in October 1932 (p. 43), and extending down to the time when he was handed a copy of the contract of February 27, 1930. Mr. Cerini, attorney for the petitioning creditors, saw this contract at this time. This was the first week in March 1933. (pp. 84, top of page.) Peters testified (p. 62):

> "I went down to Mr. Wise's home one evening, and told him—well *I asked him what had become of the patents, who held them at that time,* and what had been received for them. This was the first time he ever mentioned it. He brought out this contract of February 27, 1930, and he told me that he and Mr. Diehl and Mr. Hays had entered into the contract in New York on that day *and that no one had ever seen that contract outside of those three persons,* and that he would be willing to let me look it over with the understanding that I would not disclose the contents of the contract to anyone."

With everyone knowing that the patents had been disposed of, with everyone knowing that Wise had acted adversely and had been privately concerned in the disposition of this property of the company, with everyone knowing that Hays and Diehl, two strangers, were also in on the deal, with preferred stockholders claiming that they had a case against Hays because of this very transfer, we have this late investigation used as an excuse for non-discovery of the so-called fraud. Think of this testimony of Peters. He states:

> "I asked him what had become of the patents, who held them at that time," etc.

The fact that Mr. Peters was introduced to the affairs of the Wise Manufacturing Company over two and a half years after it had disposed of its patents affords little excuse for the delay in asking the question which he did ask of Wise "at that time".

We commend the present distinguished counsel for the petitioning creditors for their ability but this Court

will note that Cerini thought so little of this so-called case of concealment that when he filed the original bankruptcy petition, he said not one word about the transfer of the patents or the paper of February 27, 1930, one of the understandings of the "conspirators" as to their interests in such transfer. (Original petition, pp. 4 and 5.) It was not until the additional counsel came into the case that the theory was adopted that, by seizing one item of the understandings among the "conspirators" as to their sharing in the benefits of the transfer and claiming that such item was not known until "the first week in March 1933" a contention could be successfully made that the assets of this corporation were concealed until said date.

The Palm complaint showed more nearly than did the amended petition in this case, the consideration which the contract that Wise made with his "co-conspirators" yielded. That complaint showed what had become of the patents. The Wise declaration of trust prepared in April, 1931 (p. 133), had asked that stockholders should ratify the transfer and holders of 80 out of the remaining 195 shares did so. (pp. 137 to 145.) About ten per cent continued to hold out, saying to Wise that he had no right to ask for the ratification. (pp. 175, 176.) It is not relevant that a month, or six months, or a year before Wise made his deal with Hays and Diehl he might possibly have made a better contract. This case of concealment cannot be founded upon any such absurd ground. And we earnestly urge that Wise could not have concealed from Peters late in 1932 or early in 1933 the whereabouts

of these patents by representing that the company sold them for $25,000.00; that Peters could not at this late day have been fooled by the cloak of a sale for $25,000.00—a valid binding sale for $25,000.00. Not a word of testimony showed the representation was made to anyone else. Peters must have known that such a sale was inconsistent with the request for ratification contained in the declaration of trust. That it was inconsistent with what the Palm suit showed. And that it was inconsistent with the pursuit of Hays with hired attorneys. It is a striking thing that the simple question was not put to Peters as to whether he believed the statement that the patents were sold for $25,000.00.

The only creditor who claimed that any information had been passed out that the patents had been "sold" for $25,000.00 was the petitioning creditor Olin and he stated that was the impression "in the shop" (p. 162), and the Court will note that after the witness' attention was called to the fact that he had signed a note and deed of trust for $25,000.00, he testified as follows (pp. 163, 164):

> "Later on the company became indebted to me. I do not recall the fact that a resolution was adopted authorizing the execution of the $25,000.00 second deed of trust with chattel mortgage provision. This was several years ago and I have had no chance to refresh my memory. * * * I remember getting the information that the $25,000.00 check had been sent to the bank so that payment of the creditors could start and taking up of the stock."

He further stated (p. 167):

> "A. It runs through my mind that I did sign a note as secretary of the company but I believe that was all right. I believe it was authorized. It was probably the $25,000.00 note that I signed. At that time it was fresh in my memory, but that is three or four years ago."

Was Waddell, attorney for Palm and attorney for Olin and Sites, permitted to simply sleep until this kind of case was thought of? Bankruptcy inquisition is very, very effective and some have felt it is also at times very unrestrained. But bankruptcy practice does not mean that the attorney for creditors can know for three years that three men are charged with being crooks and may be called "the unholy three" holding the property of a bankrupt corporation or its proceeds in the form of stock and that because every term of that arrangement is not known, the statute does not run.

The petition said the patents were the only property the corporation had which was of any considerable value. Its plant was plastered with an $18,000.00 loan. It owed $25,000.00 in addition. The petition in bankruptcy said Wise, by his domination of the corporation, placed these patents in subjection to the contract of February 27, 1930. Peters testified that the patents were the only property of the corporation of any value. He saw that the promise of $75,000.00 had been eliminated—

> "* * * he further testified that the company had no assets whatever other than the patents." (p. 120.)

Now all the stock was not bought up and this created the chance—and Peters saw it—to say that Wise put these patents in the Wise, Hays and Diehl personal deal. But he has no right to claim, as a witness standing for the stockholders, that he believed there was simply a sale of the patents for $25,000.00 when his client Palm was claiming that he knew well enough to back it up with a verified complaint that that was nonsense and that the patents were wrongfully transferred.

White knew that there was a deal on between Wise, Hays and Diehl and he exacted the price of a $1000.00 for refraining from asking about the profit and stock that Wise was getting. And he did not let the shareholders for whom he acted sign the trust agreement that Wise tendered to Bank of America on April 3, 1931. (pp. 135 and 137 to 145.) Apparently the thing that the shareholders did not like about this trust agreement according to the testimony of Peters, was that it allowed paying the balance of the indebtedness to Owens before making any distribution among the preferred stockholders. Paragraph 1 of the Declaration of Trust (p. 141) recited that the transfer made by Wise to the Trustee would be subject to the Owens indebtedness. Paragraph 2 (p. 144) recited that the Wise stock in the Wise Patent and Development Company was held in pledge by Owens.

Now, if the money from Owens was a borrow, did Peters really have the right to believe that the $25,000.00 was the sale price of the patents and if it was at any time understood as Olin says at the shop

or if it was represented *as the findings say* that the patents were sold for $25,000.00, were not the shareholders able to ask when they were being solicited, beginning in April 1931, to sign the trust agreement, what amount Owens did claim against the Wise stock? It is almost trivial to contend that the transfer of the patents for stock was concealed by the representation. Certainly Palm, et al. did not so believe in November 1930, and not a word of Palm's testimony so indicates. *When the lie is discovered, you can no longer accept the statements of the liar and you are charged with notice.* (See *Ruhl v. Mott,* 120 Cal. 668.) About half of the shareholders signed up the trust agreement. (pp. 175, 176.) Palm, et al. stayed out and continued to compliment Wise, Hays and Diehl as the smart gentlemen who had wrongfully obtained the stock of the Wise Patent and Development Company. (Testimony of Palm, p. 155.)

The balance of the Declaration of Trust (p. 142 and following) provides for the distribution of what is yielded out of the Wise Patent and Development Company stock. Wise, who was by far the largest holder of stock in the California Corporations proposed by this Declaration of Trust, to subordinate his interests to the claims of the other preferred stockholders who had not been paid. But the Palm stockholders would not accept this arrangement. Just at the close of the testimony, proof was offered that a group of the preferred stockholders had accepted this Declaration of Trust. However, Mr. McMahon and the Palm stockholders refused to accept it. It was

shown (pp. 172 to 178), that following the meeting at the Mark Hopkins Hotel herein referred to, Attorney Waddell had received from Mr. Dobrzensky the Declaration of Trust, the name of W. P. Woolsey being inserted in the Declaration as Trustee, and twenty-one of the preferred shareholders accepted this Trust. (pp. 175, 176.) But what right did they have to be asking Wise individually for five cents if they accepted as true the statement that he had sold the patents for the $25,000.00, the sum used in paying their own creditors?

Waddell filed the complaint. Peters testified that Palm told him that he had hired Waddell because he had been an officer and director of the company. (p. 86, bottom page.) The name of George F. Sharp (p. 94) is signed on the complaint as attorney, but the files show (p. 94) Waddell was one of the attorneys and it was admitted throughout that he was the attorney for Palm. The finding is that the cause of action for damages, or in the alternative, the cause of action for rescission, was concealed until early in 1933. A party does not have forever to file a case in rescission. The case of *Ruhl v. Mott,* 120 Cal. 668 declares:

> "But when thereafter he discovers that he has been put upon and defrauded as to one material matter, notice is at once brought home to him that the man who has been false in one thing may have been false to him in all, and it becomes incumbent upon him to make full investigation."
>
> *Ruhl v. Mott,* 120 Cal. 668, 677.

We submit that a contract is no longer concealed when the claimant has ascertained that the contract

was obtained through fraud or breach of trust and has further ascertained the most valuable contents of the contract. Here, stock in a new corporation.

The theory is that the patents are the thing of great value that the corporation's patents are the consideration for the stock of Wise Patent and Development Company. Then is it not true the chief "case" against Hays and Diehl and Wise is the claim to this stock they got or to damages for conversion of it or to rescission with a view to getting the patents back?

We, of course, appreciate that Section 3 of the Bankruptcy Act is not worded precisely the same as are the sections of our Code of Civil Procedure which limit the time for commencing a fraud case. Subdivision 4 of Section 338, C. C. P. provides—

> "An action for relief on the ground of fraud, mistake, or conspiracy. The cause of action in such case is not to be deemed to have occurred until the discovery by the aggrieved party of the acts constituting the fraud, mistake or conspiracy."

It has never been held that to constitute discovery it is essential that the defrauded party shall ascertain every conceivable circumstance or fact that makes up the fraud. There would never be discovery if this was the rule.

Judge Sawyer in the case of *Teal v. Slaven*, 40 Fed. 744, repeated a discussion which he had presented in a previous decision. This discussion opens with the following statement:

> "To ascertain of what acts a discovery of the facts constituting the fraud affording the ground for relief consists, we must go to the principles established in equity law where the idea was derived. The settled principles on this point are that the party defrauded must be diligent in making inquiry, that the means of knowledge are equivalent to knowledge; *that a clue to the facts, which if followed up diligently would lead to discovery is, in law, * * * equivalent to knowledge*", etc.

Judge Sawyer then proceeds to refer to and quote from various cases including decisions of the United States Supreme Court. Assuming that there was no duty imposed on the shareholders of the corporations because of the confidential relation that Wise sustained towards them, still confidence can no longer be imposed when breach of trust is known and the rule certainly applies "that the means of knowledge are equivalent to knowledge; that a clue to the facts which if followed up diligently would lead to discovery is, in law, * * * equivalent to knowledge". The stockholders here knew at the very outset that Wise was quitting them. He was making a bargain for the benefit of Wise. He would not tell them what the terms of the deal were. But Waddell found out and Palm knew that he, Hays and Diehl had used the patents of the company to get stock in Wise Patent and Development Company. Waddell and Palm had this information in 1931. This court in the following case lays down the law with respect

to discovery of fraud in language which is about the same as that used by Judge Sawyer.

Davis v. Willey, 273 Fed. 397.

The last mentioned case cites a California case which declares:

> "And all that reasonable diligence would have disclosed, plaintiff is presumed to have known; means of knowledge in such a case being the equivalent of the knowledge which it would have produced. (Wood v. Carpenter, 101 U. S. 135; Teall v. Slaven, 40 Fed. Rep. 774.)"
>
> *Truett v. Onderdonk,* 120 Cal. 581, 589.

Think of arguing that Peters acting for Palm is deceived in 1933 by a statement from Wise that in 1930 there was a genuine sale of the patents for $25,000.00. Yet we may fairly state that the findings (p. 40) show that very theory. Two years of history were simply forgotten. Two years in which stockholders were saying we know there was no valid sale. Both the signers and the hold-outs on the trust agreement were all saying that—all saying Wise owed them something.

> "It is sufficient to start the running of the statute that the facts were discovered by an attorney employed by plaintiff; and the courts very generally hold the means of discovery to be equivalent to discovery; *and the fraud is considered to be discovered when the creditor is in possession of sufficient facts to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery.*"
>
> 27 *Corpus Juris,* p. 762.

We submit the four months period is not a meaningless limitation.

In the following case the plaintiff relied upon fraudulent transferring of property and the question was as to whether limitation ran against the case under a statute reading:

> "If any person liable to an action shall *conceal* the fact from the person entitled thereto, the action may be commenced at any time within the limitation after the discovery of the cause of action."

And the court held that such a statute means that facts are no longer concealed when a person would be put on inquiry; that when you are warned as to fraud, you cannot shut your eyes, remain supine and say fraud is still concealed. The court said:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together."
>
> *Wood v. Carpenter,* 101 U. S. 807; 25 L. ed. 808.

> "It will be observed, also, that there is no averment that during the long period over which the transactions referred to extended, the plaintiff

ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams. The conveyances to Alvin and Keller were also on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clew in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort."

Wood v. Carpenter, 101 U. S. 807; 25 L. ed. 808.

Consider paragraph 13 of the Palm complaint filed by Waddell on November 30, 1931:

"Par. 13. That on or about the 5th day of March, 1930, said *Roy T. Wise by reason of his said control of the common capital stock of the said Wise Manufacturing Company, and by reason of his control of the common capital stock of the said Standard Die & Tool Company, caused the directors and officers thereof to transfer the said patents, and all the assets and business of said corporations, and each of them, to the Wise Patent & Development Company, a Delaware corporation.* That the plaintiff is informed and believes and therefore states the fact to be that the capital stock of said Wise Patent & Development Company was and is divided into 1000 shares of preferred capital stock of the par value of $100.00 per share, and 2500 shares of common capital stock of no par value. *That plain-*

tiff is informed and believes and therefore states the fact to be that all the said capital stock, of said Wise Patent & Development Company, except for approximately five qualifying shares, is owned share and share alike by the defendants, A. M. Diehl, W. H. Hays and Roy T. Wise. That the defendants Wise Patent & Development Company, A. M. Diehl, and W. H. Hays, secured their respective interests in said patents, assets and business as hereinabove set forth with full knowledge of the representations made to said stockholders by said Roy T. Wise, and with full knowledge that the said transfer of said patents, assets and business was and is a fraud upon the rights of said preferred stockholders herein named. That the said stockholders herein named in Paragraph No. 9, have received nothing for their shares of preferred capital stock, for which the sum of $100.00 per share was paid by them. That the common stockholders of said Wise Manufacturing Company have been paid the sum of $20.00 per share for their stock; and that the holders of the common capital stock, and of certain shares of the preferred capital stock of said Standard Die & Tool Company have received the par value of their said shares after said March 5th, 1930." (pp. 91 and 92.)

The charge was a one hundred per cent cleanout.

Would the accusation have been any sweeter if the complaint had shown that Wise, by reason of his control of the corporation, had, in conjunction with Hays and Diehl, taken from it $100,000.00 and converted that into stock of a corporation? They say the patents could have been disposed of for $100,000.00.

What does filing a law suit mean?

Waddell was not produced as a witness but Peters had seen him and he told Peters he knew that there was fraud in the deal made by Wise, Hays and Diehl. (pp. 100, 101.)

> "A. No. They filed that suit, Mr. Waddell told me he figured from the complaint—just what he told me after I read the complaint—that there was *fraud* involved in the transaction some place, that he did not know very many of the facts, but *he did know the patent had been transferred out of the Wise Manufacturing Company,* or had been assigned, and that he did not know what had been received for it.
>
> Q. Then Waddell told you that when he drew that complaint he knew that fraud had been practiced upon the stockholders and everyone concerned in the Wise Manufacturing Company, did he?
>
> A. No, he did not. He said that there was *some fraud involved in the whole case, but he did not know for sure;* in fact, he said he knew very little about the whole situation, even as a director of the company."

And paragraph 15 and the prayer and verification of the Palm complaint were:

> "Par. 15. That the said transfer of the said patents, business, and assets of said Standard Die & Tool Company and said Wise Manufacturing Company dated on or about March 5th, 1930, *was and is a* FRAUD *upon the preferred stock holders* named in Paragraph 9 and upon plaintiff. That the proceeds of said transfer have been distributed contrary to and in violation of the

Articles of Incorporation of said Standard Die & Tool Company *and in fraud of the rights of stockholders* of said company herein named. That the defendants A. M. Diehl, W. H. Hays and Wise Patent & Development Company were and are parties to said transactions and knowingly participated therein."

The complaint prayed that the defendants should be compelled to pay the plaintiffs the full par value of the stock or that the defendants Wise, Diehl and Hays *should be required by the Court to cause the defendant Wise Patent and Development Company should retransfer the patents to the Standard Die and Tool Company.* The complaint prayed for general equitable relief, and for costs. An affidavit was attached to the complaint, reading as follows:

"Franklin C. Palm, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters that he believes it to be true.

Franklin C. Palm."

(pp. 92 and 93.)

Waddell sued for Palm and he was attorney for Olin and Sites. What did Palm say on his cross-examination?

"I verified that complaint. He asked me to sign it and I glanced at it, but I did not know what it was all about.

Q. You did not know you were suing Mr. Hays, Mr. Diehl and Mr. Wise?

A. Oh, yes, I knew that.

Q. They have been referred to here as the 'unholy three'. Had they been referred to as the 'unholy three' before you caused this suit to be filed?

A. No, not exactly referred to in that language.

Q. Had they been referred to in language indicating that they were three very *smart* gentlemen who had succeeded in *getting all the stock* of the Wise Patent and Development Company?

A. Yes, *I probably referred to them in that way* myself." (p. 155.)

And they had Hays on the carpet in 1932. On August 23, 1932, a meeting was held at the Mark Hopkins Hotel in San Francisco and that meeting was attended by White, by Waddell, acting as attorney for preferred stockholders, by Mr. Eltse for Wise, by Mr. Dobrzensky, acting for Hays and by Mr. McMahon, a preferred stockholder, who refused to accept the Wise trust hereinafter referred to and before that meeting, as testified to by White, it was rumored about that the three men—Hays, Wise and Diehl—had the stock of the Wise Patent and Development Company. He testified:

"Mr. Waddell had reported that for a period of five or six months previously to the San Francisco meeting, he had been unable to serve Mr. Hays in the case of Palm v. Diehl, the law suit that has been mentioned in the testimony here. I believe there was no mention at this meeting of any agreement whereby Mr. Hays and Mr. Wise and Mr. Diehl had become equal owners of

the stock in the Wise Patent and Development Company.

Q. You believe not? Had you heard that prior to your going there?

A. I heard the three names mentioned. It was rumored *about before the meeting ever occurred that those three men had the stock of that corporation.*

Q. But its purpose was to see Hays, because at that time, and for several months prior thereto it was a known or rumored fact that Hays had received stock in this corporation *and that there was some obligation on the part of Hays to make return to the stockholders of the Standard Die & Tool Company?*

A. *The stockholders felt they had a case against Mr. Hays."* (p. 151.)

What kind of case? Doubtless the same one which now shines so brilliantly in the findings prepared by counsel and which states that they have a two way cause of action *all of which was concealed until within four months of the filing of the original petition,* to-wit, either a case for damages against Hays, or a suit in rescission against the new company.

Does concealment exist in spurts and prevail as a matter of convenience in favor of claimants?

Consider Finding VII:

"The court further finds that this entire case and the transactions above set forth, on the part of said respondent, and said Will H. Hays, Ambrose N. Diehl and Roy T. Wise, are tainted with fraud and concealment and warrant a full and

complete investigation through the processes of the bankruptcy court."

One may question what would have happened to the stockholders and creditors of Wise Manufacturing Company if all this money had not been put up and hazard the statement that Mr. Wise in his capacity for persuasion and promotion converted the much criticized Mr. Hays into a rotund gentleman dressed in red and long white whiskers. Certainly we may fairly contend that this record shows not a vestige of testimony to base a finding upon that he conspired to defraud existing creditors when his first act was to send $25,000.00 to pay them in full. Mr. White testified the first check carried Hays' signature. (p. 150.)

The case presents confusion in theory. It is claimed in effect that the corporation ratified three contracts which were made by its president in his own name and with property of the corporation and that this property represented the only property of the corporation of any considerable value. But Mr. Peters, attorney for the preferred stockholders is not at all agreeable to this. Although the third contract of September 1, 1930, tied up all of the Wise one-third interest in the stock in the new corporation as well as his interest in the stock of the Wise Manufacturing Company (see end of Par. D, p. 115) Mr. Peters does not say at all that the Wise Manufacturing (the stock ownership in which is primarily stock ownership in the holding company, having preferred stockholders whom he represents) did legally ratify this contract or will stand

for this contract. His position is that Hays and Diehl have no rights to stock in the new company, no right to say that the transfer arrangement shall stand. He will not abide by the declaration of trust, although that, to the extent of the par value of the remaining preferred stock (pp. 137 to 145 and 175, 176), subordinated the Wise interests to the claims of preferred stockholders and called for a ratification of the transfer of the patents to the new company. On February 2, 1933, he had himself substituted as the attorney in the Palm case. (p. 94.) And that action still stands and the complaint prays that the transfer of the patents to the new company shall be set aside. Counsel do not dismiss the Palm suit, virtually saying that when it was filed on November 30, 1931, the preferred stockholders knew enough to justify the filing of that suit and that they did not obtain that knowledge only after Mr. Cerini saw the contract of February 27, 1930. There is no more of a severance of plan than there was when Waddell was representing Palm and was representing two of the petitioning creditors.

But our defense here does not depend on any nice distinction as to what position the corporation has taken, or what position it is in law bound to take. The plain facts are that the preferred stockholders and their attorney yelled "faithless" to Wise in 1930, started a suit through Waddell in that year to set aside the transfer of the patents, brought such pressure to bear on Wise that he took action to appease them and did appease part of the complaining stockholders, asserted demands against Hays, and claimed

they had a case against him for his collusion with Wise, and they made him hire an attorney—all on the theory that the transfer of the patents was wrongful and fraudulent and in violation of the trust duties of Wise. Yet the creditors who are also represented by Waddell, although he does not appear as one of the attorneys for the petitioning creditors, come into Court and claim that there was no "discovery" until March 1933, because it was not until then that Wise trotted out a paper that showed one of his understandings with Hays and Diehl through which it is claimed the fraudulent structure had been built and had been standing for three years.

The case rests on the erroneous contention that there was no discovery of the wrongful nature of the transaction, inclusive of the contracts that made it, or of the rights of the corporation until the verbiage of the oral and written agreements of the "conspirators" was known.

POINT III.

Obviously the court's findings depart from the pleadings and the order is founded on what is not alleged. The $75,000.00 chose in action mentioned in the amended petition simply was not proven. The findings on the point were improper. The final tri-party contract cancelled that. (pp. 116, 119.) The findings ignore this or gloss it over by the general statement that the contract of February 27, 1930, was modified

by two later contracts "which provided for certain contingent payments to respondent". This finding is untrue. (pp. 117, 118.) The record shows the absurdity of the effort to claim the case was one of concealment of the literal terms of the contract of February 27, 1930. We have shown that the court's findings went altogether beyond the fragmentary statements of the amended petition relative to the transfer of the patents. We have shown that it was not proper to plead an agreement between Wise, Hays and Diehl was represented by the contract of February 27, 1930, because that contract was modified in substantial particulars. We are not trying to be unduly critical of the petition, but we do call the court's attention to the fact that Peters had all of the books and records of the corporation for six weeks and that he was permitted to take copies of these books and records. Moreover, Wise showed them not only the contract of February 27, 1930, but he told Peters and Cerini of the other two contracts. Cerini in speaking of the conversation between himself and Wise and Peters said:

> "Mr. Wise, in the conversation referred to the fact that there had been two other contracts, I believe." (p. 83, bottom of page.)

We contend that as counsel for petitioners invited a construction of the petition which would permit them to go into the entire dealing between Wise, Hays and Diehl, they are not to be permitted to say that their clients escaped the evidence as to discovery of

the deal wherein the president of the corporation, acting with Hays and Diehl, obtained the patents of the corporation. The contract of February 27, 1930, was but a part of the plan.

Dated, Berkeley, California,
December 19, 1934.

Respectfully submitted,
CLARK, NICHOLS & ELTSE,
Attorneys for Appellant.

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No. 7604

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WISE MANUFACTURING COMPANY (a corporation),

Appellant,

vs.

E. W. OLIN, RALPH SITES and BERKELEY PATTERN WORKS,

Appellees.

BRIEF FOR APPELLEES.

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PEHNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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No. 7604

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WISE MANUFACTURING COMPANY (a corporation),

Appellant,

vs.

E. W. OLIN, RALPH SITES and BERKELEY PATTERN WORKS,

Appellees.

BRIEF FOR APPELLEES.

I.

INTRODUCTION.

This action was brought by appellees Olin, Sites and Berkeley Pattern Works, creditors of appellant, Wise Manufacturing Company, having provable claims against appellant, in excess of $500.00, to have Wise Manufacturing Company adjudicated a bankrupt.

The original petition was filed March 30, 1933, prior to actual knowledge of the concealment of certain assets and the actual details of another asset later charged, and alleging only the sale of certain assets consisting of tools and equipment and the use of the

proceeds to prefer certain creditors and the abandonment of the business and dissipation of assets to the injury of creditors.

The amended petition was filed June 7, 1933, repeating the allegations of the original petition as to the sale of the tools and equipment, but further alleging the appellant's concealment of the proceeds therefrom in a certain bank account with the intent to hinder, delay and defraud its creditors. The amended petition further charges the concealment of a certain contract, dated February 27, 1930, and the assets to the bankrupt constituted thereby. It does not mention two later modifications of that contract, the existence of which was not known by petitioners at the time of filing the amended petition.

The Honorable A. F. St. Sure, sitting in the United States District Court, heard the case and adjudicated Wise Manufacturing Company a bankrupt, finding: (1) That the proceeds of the sale of the tools and equipment had been concealed, by appellant having deposited them in a bank account in the name of an employee; (2) That the contract of February 27, 1930, and the two modifying contracts, offered in evidence by appellant, in support of its contention that the consideration provided by the original contract had then in part ceased to exist, and the rights flowing to appellant from, or pertaining to the original and modifying contracts, were assets of appellants; (3) That the said contracts, the assets constituted thereby and arising therefrom, and possible causes of action arising therefrom, were concealed by appel-

lant; (4) That the transactions by which the concealments were effected were also concealed; (5) That the concealment of the contracts, the assets constituted thereby, the transactions by which the concealments were effected and the said possible causes of action, were kept concealed, and creditors and stockholders actively misled, by certain false representations with regard thereto; (6) That these concealments were with the intent to hinder, delay and defraud creditors; (7) That the concealments continued from the time of their commission and were not discovered up to within four months of the filing of both the original and amended petitions; and finally, (8) That the transactions described are *tainted with fraud and concealment and warrant a full and complete investigation through the processes of the Bankruptcy Court.*

This appeal is neither based upon a contention that appellant is not bankrupt, nor upon any contention that it has not concealed its assets. On the contrary, it admits, in substance, that a conspiracy to defraud has been proven, but claims appellees should have uncovered the fraud sooner, and that, since, of the assets concealed, one of them, the bank deposit, has now disappeared (although this is not proven), or had become difficult to realize upon, and since another, the contract, has been modified as to consideration, the concealments do not warrant the adjudication.

In the final analysis, appellant is here attempting to resist investigation and resort to the processes of the

Bankruptcy Court, which the District Court felt should be had, in order to continue to deprive its creditors of their due. It was strenuously maintained at the trial, and here, but not so obviously, that the corporation has no assets and, therefore, that it would be useless to order an adjudication. Appellant is making a very determined and costly fight to keep this company out of bankruptcy, which seems rather inconsistent with the claim that it has no assets.

Appellees' position is that the facts warrant the adjudication, that they neither knew, nor were chargeable with knowledge of the concealments prior to the four months' period, that a Trustee in Bankruptcy is the proper party to realize on the bankrupt's assets, that appellees should not be obliged to assume the entire burden of uncovering and bringing in those assets alone, when the benefits thereof will be available to all creditors alike, and that denial of resort to the processes of the Bankruptcy Court might result in perpetuation of the fraud and concealments already proven and found.

II.

DRAMATIS PERSONAE.

Our efforts being to clarify the facts of this case, in the belief that an affirmance of the adjudication of the court below will follow upon the facts being clearly brought to this court's attention, we set forth, for the convenience of the court the names and a brief description of the persons herein involved or mentioned.

The object of these descriptions will be, in part, to aid the court to follow the references in both briefs to the various persons involved, and in part, to clarify and correct the haphazard statement of the case and statement of facts contained at scattered places in appellant's brief,* in other words to fulfil the functions of a counter statement of facts.

Wise Manufacturing Company: Respondent below, appellant here. A California corporation which, by contract, had taken over the assets and assumed the liabilities of Standard Die & Tool Company, Inc. Its stock was all common, 4670 shares of which were held by Standard Die & Tool Company, Inc., and 271 shares by others. All of this outside stock was later bought up by Wise with money derived from the transfer of the corporation's patents.

Standard Die & Tool Company, Inc.: An inactive California corporation which had sold its patents and its other assets (although the assignment was never formally made) to Wise Manufacturing Company. 660 out of a total of 694 shares of its common stock was held by Roy T. Wise. Of its preferred stock, 5 shares were held by Roy T. Wise and the remaining 258 by others. All of the outstanding common and some of the outside preferred stock was later acquired by Wise with money derived from the transfer of the patents of Wise Manufacturing Company.

Wise Patent and Development Company: A Delaware corporation formed by Wise, Hays and Diehl to

*A perusal of appellant's brief will disclose to the court the numerous other matters wherein its brief fails to comply with the Rules of Court.

take over the patents of Wise Manufacturing Company for a consideration of $75,000.00, which consideration was subsequently reduced by the modifying contracts. The later contracts were brought to the attention of the petitioners and appellees for the first time with the filing of the answer. This corporation was owned and controlled entirely by Hays, Wise and Diehl at all times, as was Wise Manufacturing Company controlled by Wise alone. For this reason there is a possibility that these modifying contracts were manufactured after the event, and appellees are justified in so asserting, in the light of other evidences of fraud and criminal acts, both amply proven at the trial.

Roy T. Wise: Promoter and inventor. President of, and a director, and in control of Wise Manufacturing Company and Standard Die & Tool Company, Inc. Also holder of one-third of the stock in Wise Patent and Development Company. It was Wise who contacted Hays and Diehl and made the contract of February 27, 1930, by which the patents were transferred outright to Wise Patent and Development Company in consideration of $75,000.00, at a time when a contract with Westinghouse Electric & Manufacturing Company was available by which $100,000.00, in addition to royalties, was to be paid for one year's use of the patents.

Pansy Wise: Wife of Roy T. Wise. Officer, director and stockholder of Wise Manufacturing Company and Standard Die & Tool Company, Inc.

Edward W. Olin: Shop foreman (and a dummy director) of Wise Manufacturing Company. He is one

of the petitioning creditors here and at one time brought a suit against the appellant upon a labor claim, being represented in that action by Mr. Waddell.

Ralph Sites: One of the petitioning creditors, formerly a workman in Wise Manufacturing Company's shop and who one time brought a suit against the company upon a labor claim, being represented therein by Mr. Waddell.

Berkeley Pattern Works: One of the petitioning creditors.

Huldur Jacobsen: Personal secretary and stenographer to Wise, in whose name a bank account was opened to deposit the proceeds of the sale of tools and equipment of the Wise Manufacturing Company, not, it is claimed by appellant to defraud or cheat creditors, but merely with the view to preventing attachment of the funds by creditors, which hiding of assets, appellant claims is no departure from the secrecy and privacy with which an individual is entitled to transact his business. (Appellant's Brief p. 10.)

Will H. Hays: Sullivan, Indiana, and Beverly Hills, California, capitalist, attorney at law, moving picture magnate, promoter, and one of the combination who formed and financed the formation of Wise Patent and Development Company, acquired one-third of its stock and financed the acquisition of the patents by it, after first securing the much more favorable contract from Westinghouse Electric & Manufacturing Company, all with the knowledge of but one of the stockholders of Wise Manufacturing

Company, namely, Wise. In the arguments before the District Court counsel for respondent, appellant here, described Hays as the reason back of the resistance to the adjudication of Wise Manufacturing Company as bankrupt, in the following phrase: "Mr. Hays would not like it".

Diehl, Ambrose N.: Diehl, president of the Columbia Steel Company, subsidiary of the Bethlehem Steel Corporation, and the contact man with Westinghouse Electric & Manufacturing Company, and one of the participants, to the extent of one-third of the stock in Wise Patent and Development Company in the profits to be derived from the patents of Wise Manufacturing Company.

Alonzo C. Owens: Law partner of Hays in Sullivan, Indiana, who handled in behalf of Hays the financial and other details of the various transactions between Hays, Diehl, Wise, and Wise Patent and Development Company. It was to Alonzo C. Owens that a note and mortgage was given for $25,000.00 upon the assets of Wise Manufacturing Company to secure the repayment of $25,000.00 advanced by Hays to pay off certain creditors and some stockholders. This is the same $25,000.00 that Wise falsely represented he received for the patents. The deal was handled in Owens' name to keep the name of Hays out of the picture.

The Unholy Three: Roy T. Wise, Will H. Hays and Ambrose N. Diehl.

This was simply an appellation which sprang into being for the first time at the trial, upon the realiza-

tion of the unrighteousness of the transactions of these parties, and, particularly, that portion of the contract of February 27, 1930, which permitted a portion of the $75,000.00 consideration for the patents to be used by Wise to freeze out the balance of the stockholders in the California companies, so that they would not participate, even to a small extent, in the profit to be derived from the $75,000.00 consideration. Appellant's brief attempts to claim that Hays, Diehl and Wise were being referred to as "the unholy three" prior to the trial and to argue therefrom that appellees must have had knowledge or means of knowledge of the illegal transaction at a much earlier date. This, however, was not the case.

Palm: Franklin C. Palm, professor of history at the University of California, one of the holders of preferred stock in Standard Die & Tool Company, Inc. On November 30, 1931, Professor Palm, in his own behalf and as attorney-in-fact for various stockholders of Standard Die & Tool Company, Inc., brought suit against Diehl, Hays, Wise and Wise Patent and Development Company in the United States District Court, Northern District of California, to compel payment to plaintiffs of the full par value of their stock, or to require Wise, Diehl, Hays and Wise Patent and Development Company to retransfer the patents to the California companies. At the time this suit was brought, Professor Palm was, with others, under the impression that $25,000.00 had been received by Wise Manufacturing Company for the patents. Appellant here seeks to charge petitioners with knowledge of all of the transactions and con-

tracts between Hays, Diehl, Wise, Wise Patent and Development Company and Wise Manufacturing Company, by reason of the fact that this suit was a matter of public record and by reason of the fact that the attorney for Professor Palm in that case was also the attorney for two of the petitioning creditors, namely, Olin and Sites, in a Justice's Court action on labor claims against the Wise Manufacturing Company.

Halsey J. White: An employee of the American Investment Company, an affiliate of the Bank of America in Berkeley. He was employed by Wise to dispose of part of the $30,000.00 of preferred stock of the Standard Die & Tool Company, Inc., and sold some of it to his customers in the bank. He was also a preferred stockholder in Standard Die & Tool Company, Inc. Mr. White was paid the sum of $1000.00 by Hays over and above the repayment to him of the face value of his stock, in consideration of his refraining from insisting on getting the facts concerning the transfers of the patents. As unofficial representative of a number of other preferred stockholders, he had made inquiries concerning the details of the transfer and what had become of the patents and what consideration, if any, was paid therefor. It was to White that Wise stated he was not at liberty to disclose the information.

Mr. Sorrick: Manager of the Bank of America at Berkeley, who was told by Mr. Eltse, of Clark, Nichols Eltse, not to give any information concerning the $25,000.00 transaction, as one of the conditions of the

pay-off of certain creditors and stockholders was that the terms of the deal and the parties involved were not to be discussed or revealed.

Douglas F. Scott: The trust officer of the Bank of America at Berkeley, who handled escrow 167, through which money was paid by Hays to buy up all of the outstanding common stock of the Wise Manufacturing Company and the outstanding common and some of the preferred stock of Standard Die & Tool Company, Inc., and also to pay certain of the creditors.

Waddell: James Waddell, attorney at law, one of the attorneys for Palm in his suit in behalf of stockholders against Hays, Wise, Diehl and Wise Patent and Development Company. George F. Sharp was the other attorney, but he does not enter into the picture here. Waddell was also attorney for Olin and Sites at one time in the above-referred to labor claims suit. He was also attorney for and director of Wise Manufacturing Company. Although nothing appears in the record to the effect that Waddell had any knowledge of the concealments or fraudulent transactions involved in this case, appellant seeks to charge appellees with knowledge supposed to be had by Waddell because he drew the complaint for Palm, and because at one time he was attorney for two of the appellees here, in a different matter, and because of inferred possibility of knowledge gained by reason of his representation of Wise Manufacturing Company as director and attorney.

N. W. Dobrzensky: Attorney for Will H. Hays, but not of record in any capacity in this action.

Clark, Nichols & Eltse: Attorneys of record in this proceeding for Wise Manufacturing Company. Mr. Eltse, of this firm, was attorney for and director of Standard Die & Tool Company, Inc., arranged Escrow 167, and gave instructions that no information was to be given out concerning it. It was Mr. Eltse, also, who sent out the letter to stockholders of Wise Manufacturing Company and Standard Die & Tool Company, Inc., urging them to turn in their stock, intimating that creditors of the companies might take action which would cause the stockholders loss, although, at the time, all of the creditors had been paid off through Escrow 167.

F. W. Peters: Present attorney for Franklin C. Palm and other preferred stockholders of Standard Die & Tool Company, Inc. Mr. Peters was substituted for Mr. Waddell in the case of *Palm v. Hays, et al.,* on February 6, 1933, Professor Palm being dissatisfied with the lack of progress being made by Mr. Waddell and his failure to develop sufficient facts to proceed beyond the filing of the complaint in that action. It was Mr. Peters who developed the history of the transfer of the patents and of the Hays, Diehl and Wise transactions, and from whom petitioning creditors, on or about March 30, 1933, received their first information as to these concealments of assets and fraudulent transactions.

Floyd B. Cerini: Attorney for the petitioning creditors, and who initiated this proceeding. It was to Mr. Cerini that Mr. Peters disclosed the information as to the concealment of assets by the appellant, and

Mr. Cerini accompanied Mr. Peters on some of his later visits to Mr. Wise. Mr. Cerini associated Resleure, Vivell & Pinckney and Eugene R. Elerding herein shortly prior to the trial.

III.

ARGUMENT.

1. REFUTATION OF APPELLANT'S POINT I, THAT THE CONCEALMENT OF THE BANK DEPOSIT WAS NOT GROUND FOR ADJUDICATION IN BANKRUPTCY BECAUSE: (1) THERE WAS NO INTENT TO CHEAT OR DEFRAUD CREDITORS, MERELY TO HIDE ASSETS FROM THEM; AND (2) THE OBJECT OF THE CONCEALMENT HAD DISAPPEARED PRIOR TO THE 4 MONTHS PERIOD.

(a) Concealment of assets to prevent creditors from attaching is an act of bankruptcy.

It is obvious from the statements in appellant's brief that the bank deposit transaction constituted concealment with intent to hinder and delay creditors, if not to defraud them.

Wise sold certain tools and equipment of Wise Manufacturing Company for $612.00, or thereabouts, and with the avowed intention of preventing creditors from attaching the fund, placed the proceeds in a bank deposit in the name of his secretary and stenographer, Miss Huldur Jacobsen. So far proof is supplied by a stipulation of the parties made in open court (75-81). It was also stipulated that Huldur Jacobsen took the money and the Company has never been able to collect it, and that $184.85 of the fund went to pay attorney's fees. It is claimed, but neither

proved nor stipulated, that the balance of $345.55 went to pay Huldur Jacobsen for prior salary. It is not claimed even that the salary was for services of a recent date.

Appellant, with refreshing naiveté, states that it does not concede that such *hiding of assets* is an act of bankruptcy, unless the intent is to *defraud or cheat* creditors. Appellant admits, however, that the transaction is a technical concealment with a view to hindering, delaying and defrauding creditors, but claims that this is not a departure from the secrecy and privacy with which any individual is entitled to transact his business. The Bankruptcy Act, however, shows on its face that intent to defraud is not necessary because the words "hindering, delaying or defrauding" are set forth in the disjunctive. The statute reads,

> "Acts of Bankruptcy by a person shall consist in his having:
>
> (1) Conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them."

We can hardly conceive a situation whereby a creditor can be more hindered or delayed than by hiding assets so that he cannot attach them.

Appellant cites no authority for his position that there must be actual intent to defraud creditors as well as hindering or delaying them, from which we infer that as to this transaction the act of bankruptcy is shown.

In 7 *Corpus Juris,* at p. 50, the words, "intent to hinder, delay or defraud" are defined as follows:

> "Such intent involved a purpose wrongfully or *unjustifiably* to prevent, object, embarrass or postpone creditors in the collection or enforcement of their claims, and may be inferred from the natural and necessary result of transfer."

In *In re Hughes,* 183 Fed. 872 at 874, the issue is fully and clearly determined in the following language:

> "The question, therefore, is whether this was a conveyance 'with intent to hinder, delay, *or* defraud' creditors, or any of them. The statute is in the disjunctive, and while it may be admitted, and is I think true, that the words 'hinder' and 'delay' are synonymous (Read v. Worthington, 9 Bosw. (N. Y.) 628), it is not necessary, on the language of the statute itself, that any intent to defraud should be present. It is enough if any creditor is intentionally to be hindered or delayed. If the intent to hinder and delay exists, a conveyance made by an embarrassed debtor with a view, known to the purchaser, of securing the conveyed property from attachment, is voidable as against creditors, even though it be honestly made, and the debtor intends, as Hughes says he did, that all creditors should be paid in full. Kimball v. Thompson, 4 Cush. (Mass.) 446, 50 Am. Dec. 799. This must necessarily be the correct view upon any consideration of language which traces its origin to the statute of Elizabeth; for a debtor's property is in legal theory subject to immediate process at the instance of any creditor, and a debtor will not be permitted to hinder or

delay any creditor by any device which leaves his property, or the avails of it, subject to his control and disposition; and it makes no difference that the debtor intends to apply the avails of the same to the payment of his debts. It still remains true that he has hindered his debtors from applying the property in the way that they have a legal right to rely upon."

(b) **Concealment is a continuing offense and lasts up to the time of discovery and does not cease to be a concealment when the property itself ceases to exist.**

The only two cases dealing with the duration of the act, definitely hold that the concealment continues up to the time of its discovery, and if not discovered until within four months of filing of petition for adjudication in bankruptcy, even though committed prior to the four months period, it nevertheless continues as an act in bankruptcy. Thus in *Citizens' Bank v. W. C. De Pauw Co.,* 105 Fed. 926 at 930, Grosscup, Circuit Judge, delivered the opinion of the court, as follows:

"* * * It may, perhaps, with correctness, be said that the separation of some tangible thing, money, or chose in action, from the body of an insolvent debtor's estate, *and its secretion from those who have a right to seize upon it for the payment of their debts, is, within the law, a concealment, and continues such as long as the secretion remains.* In such case, the property open to creditors is decreased by just the amount thus secreted. It is, to all intents and purposes, so far as the creditors are concerned, as if the property thus secreted had not been in existence. There is nothing to put the creditors upon notice; nothing

> that they may keep within their vision—a tangible subject of inquiry, either as to its value or its ownership. It is, in effect, a concealed withdrawal from possibility of seizure of just so much of the debtor's estate."

In *In re Havens,* 255 Fed. at 478, 481, the Circuit Court of Appeals for the Second Circuit says:

> "* * * *The concealment of property* made an act of bankruptcy by section 3 *may be a continuing concealment and the four months period may run from the date of discovery.* Citizens' Bank v. De Pauw Co., 105 Fed. 926, 45 C. C. A. 130. It was, we think, clearly the intent of the pleader to allege a continuing concealment, not discovered until within four months of amendment."

Appellant admits that the act of concealment continues up to the time of discovery, but contends that because the bank deposit here was all used up and paid out in 1931, the subject matter to which the act of concealment relates, had ceased to exist and that the act of concealment could not continue after such cessation of existence. Appellant cites two cases, *Citizens' Bank v. De Pauw Co.,* 105 Fed. 926, and *Ruthers v. U. S.,* 9 Fed. (2d) 496, for this second of its naive contentions. Neither of these cases is, we submit, even remotely in point.

The law on the subject is exactly contrary to appellant's contention. Thus in *Kalin, et al. v. United States,* 2 Fed. (2d) pp. 58-59, the Circuit Court upheld the following charge to the jury:

> 'Now, I charge you that, in order to constitute a fraudulent concealment, *it is not necessary that*

> *the money should be retained for their own use for any indefinite or definite time,* but if they knowingly and if they fraudulently kept away from their trustee in bankruptcy any of their assets and used it for the purpose of their own benefit or for the purpose of benefiting some other person, not merely paying a creditor as against another in anticipation of bankruptcy, *but if they fraudulently concealed from the trustee in bankruptcy the fact of having the assets and the assets themselves and used it either for their own benefit or for some one whom they selected to prefer or to be a beneficiary of it, they would be guilty in either event.'* ''

In *United States v. Knickerbocker Fur Coat Co.,* 66 Fed. Rep. (2d) 388 at 390, the Circuit Court of Appeals for the Second Circuit says:

> "* * * *And the crime is complete when the act of concealment or transfer is performed with a criminal intent.*"

While these two cases were, like the second of the cases cited by appellant, brought under the criminal statute, the principle, that the act is complete when the concealment is made or the transfer performed, regardless of the non-existence, or later destruction or alienation of the asset, is the same. Moreover, there is no proof that the property in question had ceased to exist. The stipulation upon which appellant so confidently relies to supply its defect in proof, expressly excluded any stipulation as to the disposition of the money, and the furthest the stipulation went was to agree that Huldur Jacobsen took the money

and that the company has never been able to collect it, and that Clark, Nichols & Eltse got $184.85 on account of attorney's fees.

We quote from the transcript of record at page 80:

"Mr. Resleure. All right. We will stipulate to everything that Mr. Clark says, except we won't stipulate that the $345.55 went to pay prior salary. You can testify, yourself, as to that.

Mr. Clark. * * * She took the money, we never have been able to collect it.

Mr. Resleure. All right, we will agree to it.

Mr. Clark. And will you stipulate we got $184.85 on account of attorneys' fees?

Mr. Resleure. Yes."

There is nothing in the stipulation to show that the balance of the fund has disappeared, and it would make no difference if it had. If appellant's theory were correct, then an insolvent debtor could hide his assets, thereby preventing their attachment by creditors, and later, beyond the four months' period, destroy those assets and thereby accomplish a defeating of the provisions of the Bankruptcy Act.

The law is well settled that all that is necessary to constitute the defendant a bankrupt is that he owes debts; it is not necessary that he has assets.

Vulcan Sheet Metal Co. v. North Platte Co., 220 Fed. 106;

In re J. M. Ceballos, 161 Fed. 445;

In re Hirsch, 97 Fed. 571.

From this statement of the law it is obvious that a later destruction of assets would not cure a prior con-

cealment, otherwise the points decided by the above decisions would be academic only.

Appellant contends that because the words "was an asset" are used in the findings instead of the words "the money deposited *is* the property of the corporation", that appellees have adopted the theory contended by appellant that if the money is no longer the property of the corporation, there is no act of bankruptcy. This is not appellees' position. Furthermore, the attempt to secure a stipulation as to the later fraudulent transfer or preference of the property concealed, does not cure the earlier concealment. Even had appellant accepted appellees' invitation to prove this, it would not have helped appellant's case. As a matter of fact, Roy T. Wise and Huldur Jacobsen were discreetly kept from the stand throughout the entire trial. The whole point is that we pleaded and proved a concealment, and there is no variance shown, simply because a later fraudulent disposition, unknown to petitioners, is attempted to be set up.*

*This fully answers appellant's Point III, that appellees pleaded a consideration under the contract of February 27, whereas there proved and the court found an amended consideration under the modifying contract. For this reason that portion of appellant's brief will not be further treated.

2. REFUTATION OF APPELLANT'S POINT II THAT THE CONCEALMENT OF THE CONTRACT OF FEBRUARY 27, 1930, AND THE ASSET CONSTITUTED THEREBY WAS NOT AN ACT OF BANKRUPTCY WITHIN THE FOUR MONTHS PERIOD, BECAUSE: PETITIONING CREDITORS SHOULD HAVE KNOWN ABOUT IT SOONER; THE CONSIDERATION PROVIDED IN THAT CONTRACT WAS CHANGED; AND ALL OF THE CONSIDERATION FOR THE CONTRACT WAS NOT PAID, DUE TO FAILURE IN PART OF THE DEAL WITH THE WESTINGHOUSE ELECTRIC MANUFACTURING COMPANY BY REASON OF DELAY WHILE THE "UNHOLY THREE" WERE TRYING TO GARNER IN THE LAST OUNCE OF PROFIT FROM THE FRAUDULENT TRANSACTIONS.

(a) Concealment may be a continuing act and, in this case, the contract of February 27, 1930, the modifying contracts and the assets constituted thereby were actively concealed until March 30, 1933.

The evidence in the case was clear, convincing and definite that the first knowledge that petitioning, or any, creditors received, as to the Hays, Diehl and Wise transactions, and the existence of the contract of February 27, 1930, was obtained through the investigation made by F. W. Peters, in his capacity as attorney for Franklin C. Palm, a shareholder of Standard Die & Tool Company, Inc. The existence of the modifying contract was not known until the answer herein was filed.

Fred W. Peters stated he did not receive the contract of February 27, 1930, until February 23, 1933, about three months after he first contacted Mr. Wise, and that he knew when petitioning creditors first became acquainted with the existence of this contract, because he told Mr. Cerini, who represented the creditors, about the contract next day, February 24,

1933, but did not show him the contents until two weeks later (63).

Floyd B. Cerini, one of the attorneys for the petitioning creditors, stated that in a conversation with Mr. Wise and Mr. Peters, about the first week of March, 1933, Mr. Wise stated he did not want the contract disclosed to any one, that very few people knew of it, and that he did not want Mr. Dobrzensky to know that Mr. Peters had seen the contract. Mr. Cerini further stated that that was the first time he learned about the contract and that, a week or two later, he imparted knowledge of the contract to his clients (82, 83).

Mr. Douglas F. Scott, trust officer of the Bank of America, testified that even the details of Escrow 167, through which certain creditors and stockholders received payment, was kept secret, that he had received a letter from Ralph R. Eltse reading in part, "we solicit confidence as to all matters contained in this letter", and that Scott observed confidence in regard to the escrow and nobody knew of any of the matters contained in it (132).

Halsey J. White did not know that the patents were being transferred, although he seemed to have been more active than any one else in uncovering the facts. He was the last of the common stockholders to take down the money that was put up for the common stock (150), and he was paid $1000.00 in consideration of his refraining from insisting on getting the facts as to the transfers and that that was the real and true

consideration (152). This consideration, paid to aid and assist in keeping the transactions secret, was paid by Mr. Hays (148).

In order to mislead creditors and others as to the existence and details of the contracts, Wise falsely represented that he had received $25,000.00 for the patents (70, 96, 126, 162). This was the same $25,000.00 which Hays had loaned to the company, through Alonzo Owens, and for which Hays received, in the name of Owens, a note and mortgage and certain of appellant's assets.

It is contended that as Waddell was attorney for the petitioning creditors, and for Franklin C. Palm in his suit against Hays, Wise, Diehl and the Patent Development Company, the petitioning creditors are charged with knowledge which Waddell may have had. In the first place, an examination into the nature of Waddell's representations of Olin and Sites, two of the petitioning creditors, discloses no reason why he should or would have given them any information, even if he himself had knowledge of these facts with regard to the concealment of the contracts. Waddell was attorney for these two petitioning creditors only in a Justice Court action against Wise Manufacturing Company upon certain labor claims (168). In the second place, an examination of the complaint in the suit of Palm against Hays, et al., discloses no knowledge on the part of Waddell as to the contracts. On the contrary, it discloses an almost entire lack of knowledge (87-94). The suit in question simply prayed

that defendants should pay the plaintiffs the full par value of their stock or that the Wise Patent and Development Company retransfer the patents to Standard Die & Tool Company.

The complaint in Palm's suit is significantly silent as to the details of the transfers and shows complete lack of knowledge of the true facts. Thus it says that on March 5, 1930, Wise, by reason of his control of Wise Manufacturing Company and Standard Die & Tool Co., Inc., caused all the assets and business of these corporations to be transferred to Wise Patent and Development Company (91). It says nothing as to the nature of the transfer, the consideration therefor, the contract between Hays, Diehl and Wise, nor the existing deal with the Westinghouse Electric & Manufacturing Company. It is not credible that Waddell could have known of these matters and not helped them.

Moreover, even had Waddell actual knowledge of the facts in question, his representation of Wise and of Wise Manufacturing Company would have sealed his lips to other clients. Furthermore, there is no proof that he divulged such information to the creditors, if he had it. The proof is that the creditors did not have any information.

Appellant contends that Palm knew when he filed his suit in November, 1930, that Wise was lying when he represented that $25,000.00 was the sale price of the patents and intimates that Mr. Peters did not believe this was true. Appellant is again refreshingly naive when it cites authority for the proposition that:

> "When a lie is discovered, you can no longer accept the statements of the liar and you are charged with notice."

From this statement of the law, appellant argues, that, since a clue to the fraud or concealments was available to appellees, which if diligently followed up would have led to a discovery of the full and true facts, they were chargeable with knowledge of the entire situation.

We have no quarrel with the authorities cited by appellant in support of this contention, except that they deal with statutes of limitation and not with the four months period prescribed by the Bankruptcy Act. We do dispute, however, appellant's premises.

In the first place, the clue was extremely slight and the trail effectively covered by appellant's active false representations. Moreover, it was the stockholders and not the petitioning creditors who became suspicious, and there is no evidence in the record to the effect that they divulged their suspicions or any clue that they might have had to the petitioning, or other, creditors. Moreover, these stockholders who became suspicious or, as appellant puts it, had a clue to appellant's wrong doing, did exercise all due diligence in attempting to thrust aside the veil of secrecy and concealment surrounding the transactions. They did what they could. They employed Waddell to investigate. When Waddell gave them no satisfaction or results, either by reason of the fact that he could uncover nothing, or because he ran into a situation as to which his lips were sealed on account of his dual

representation of Palm and the Wise Manufacturing Company, they employed Mr. Peters. It took Mr. Peters almost three months of constant effort to get Wise to speak, and no one examining the record will claim that Peters was not a diligent investigator. Furthermore, all the knowledge and all the information was in the control of Hays, Diehl and Wise, and they guarded their secret well. There is nothing in the record to show that Wise would have been ready to talk until after three months of constant pressure from Mr. Peters. The evidence is that he did not talk till then. The burden is on appellant to show he would have talked sooner.

The law does not require an unreasonable standard of diligence, even after suspicions are generated or a clue discovered, but merely requires that diligence which a reasonable man would exercise under the circumstances. The law, furthermore, will not seize upon some small circumstance to show that a person has not discovered the fact that he has been cheated soon enough, in order to deny relief to such a person who has been plainly shown to have been defrauded. Thus Judge Olney, in *Victor Oil Co. v. Drum,* 184 Cal. 226, 241, said:

> "Without some information which carried a direct implication or suggestion of possible fraud, the plaintiff could not be put upon inquiry. The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been actually defrauded against those who defrauded him on the ground, forsooth, that he did not discover the fact that he had been

> cheated as soon as he might have done. *It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with a discovery in advance of actual knowledge on his part.*"

In any event, neither the petitioning, nor any other, creditors had any knowledge, information, clue or suspicion of these contracts or the concealment of the assets represented thereby until Mr. Peters took Cerini into his confidence about March 30, 1933.

(b) The authenticity of the modifying contracts is not definitely established, but at best, these contracts merely diminished the consideration, and they still constitute an asset to appellant which was effectively concealed, and knowledge thereof was not developed until appellant's answer to the petition was filed.

Appellant contends that because the $75,000.00 consideration provided for in the contract of February 27, 1930, was cancelled and a new contingent consideration substituted therefor, petitioners' cause of action to adjudicate appellant a bankrupt, falls.

We do not admit the validity or authenticity of these modifying contracts and submit that "The Unholy Three" were not incapable even of manufacturing these contracts *ex post facto,* to prevent their transactions from being investigated by the Bankruptcy Court.

Furthermore, there was no valuable consideration for the alleged modifications in the selling prices of appellant's patents. Hays, Diehl and Wise had no

warrant to deprive the Wise Manufacturing Company, its stockholders and creditors, of the benefits of the earlier contract, just because, in their greed to secure the last ounce of profit from their fraud, they postponed closing the deal with Westinghouse Electric & Manufacturing Company until such time as they could freeze out the other stockholders, and thereby failed to close their deal until the beginning of the recent economic depression. It is true that the value of the patents was reduced by general economic conditions and that Westinghouse Electric & Manufacturing Company insisted, the deal not having been promptly closed, on a reduction in their terms of payment. This, however, was a chance that Hays, Diehl and Wise took when they delayed closing with Westinghouse in order to have time to eliminate the other stockholders. It is just another evidence of their bad faith, that, having lost by their delay, they sought to have appellant and its stockholders and creditors absorb the loss.

The foregoing, however, is largely beside the point. If the modifying contracts are not authentic or if they are invalid by reason of lack of consideration, then the act of bankruptcy consists of having concealed the contract of February 27, 1930. If, on the other hand, the modifying contracts are valid and authentic, the act of bankruptcy consists of concealing them and the assets they represented.

It is not disputed that there was, and still is, money coming from Wise Patent and Development Company, even under these modifying contracts, nor that Wise Patent and Development Company is still receiving

royalties from Westinghouse Electric & Manufacturing Company, wherewith to pay its creditors after advances by Westinghouse and Hays are paid (118, 119). As to the concealment of these assets, there can be no question as to lack of knowledge on the part of petitioning creditors prior to the four months period, because, as we have already shown, knowledge of these modifying contracts was not had until the answer herein was filed.

The most that can be said, in criticism of the lower court's findings and its order of adjudication, is that appellees plead the consideration set forth in the contract of February 27, 1930, and proved the concealment of the consideration of the two modifying contracts. In other words, that appellees have alleged the whole and proven only the part. We submit that, if that part was an asset concealed, there is still a concealment of assets clearly within the four months period. The Bankruptcy Act merely requires that an asset be concealed. It does not specify what the value of that asset shall be, and we submit that, having pleaded that the asset was worth $75,000.00, there is no variance if appellees were able to prove only a lesser value than $75,000.00 by reason of later modifying contracts, the existence of which were not known at the time the petition was filed. If appellant's theory in this regard were correct, all that would be necessary for a fraudulent debtor to evade an adjudication in bankruptcy would be to wrongfully dispose of or reduce the value of the asset concealed, thus encouraging further fraud on creditors.

IV.

CONCLUSION.

In conclusion we submit:

1. That the lower court heard all of the testimony of all of the witnesses at the trial and had the opportunity to observe the demeanor of these witnesses on the stand. Its findings are therefore not subject to review, and should be accepted by this court, unless manifest error is shown.

2. That any one act of bankruptcy, if supported by the testimony, is sufficient to warrant the adjudication.

3. That the concealment, both of the bank account and the assets represented by the various contracts, have been definitely established.

4. That these concealments of assets continued to within four months of the filing of both the original and amended petitions, and it has not been established that petitioning creditors were charged with knowledge of such concealment prior to the four months period.

5. That neither destruction, change, or decrease in value of the concealed assets changed the status of the concealments.

6. That each and every one of the concealments proven were with the intent at least to hinder and delay creditors, and that the evidence warrants the further conclusion that they were with the intent to defraud creditors, although proof of fraud was not necessary to the adjudication.

7. That to deny an adjudication in bankruptcy in this case would be to aid, assist and comfort appellant and "The Unholy Three" in perpetuating their wrongdoing and to enable the latter to profit at the expense of the former's creditors, notwithstanding the fact that the lower court found that this entire case, and the transactions of Hays, Diehl and Wise, *are tainted with fraud and concealment and warrant a full and complete investigation through the processes of the bankruptcy court.*

Dated, San Francisco,
April 1, 1935.

RESLEURE, VIVELL & PINCKNEY,
FLOYD B. CERINI,
EUGENE R. ELERDING,
Attorneys for Appellees.

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No. 7604

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WISE MANUFACTURING COMPANY
(a corporation),
Appellant,

vs.

E. W. OLIN, RALPH SITES and BERKELEY
PATTERN WORKS,
Appellees.

APPELLEES' PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

INTRODUCTION.

We sincerely believe that a rehearing in this case is advisable and essential not only to correct an injustice done to appellees, not only to correct the injustice done to numerous other creditors of appellant in whose interest appellees sought the adjudication of appellant as a bankrupt, not only to correct an injustice done to Judge St. Sure whose carefully considered decision has been reversed in a most unusual

manner, but also for the benefit and in the interest of this Court.

In this latter connection we believe that this Court is now on record as being willing to treat a bankruptcy or equity appeal as a trial *de novo* and has abandoned the doctrine as to the finality of the findings of the District Court on matters of conflicting testimony.

We believe that it has gone further in this case and has developed for the purposes of its decision on appeal, facts, not only found otherwise by the District Court on amply supporting evidence, but also has found contrary to the District Court upon independent findings of its own for which there is absolutely no support in the record.

If this Court continues so to leave itself upon record, we believe that no litigant will feel that his cause has any more than begun when the lower Court finds against him. Consequently the business of this Court will be materially increased henceforth.

We believe that this decision, if allowed to stand of record, will also materially increase the work and business of this Court, since by its present decision it has indicated a willingness to abandon the salutary rule set forth by Judge Wilbur in the case of *McCarty v. Ruddick,* 43 F. (2d) 976 which is succinctly stated by Mr. Paul O'Brien as follows:

> "Points not argued in the brief are presumed to be abandoned."
>
> *O'Brien's Manual of Federal Appellate Procedure,* 1934 Supplement, page 101.

The entire basis of the Court's decision as to the concealment of the contracts arises for the first time in the Court's opinion. Counsel for appellant did not have the temerity to urge that these contracts were not contracts of appellant, that Wise was not the *alter ego* of appellant, that these contracts did not constitute an asset of appellant, or that these contracts did not constitute an asset of appellant by virtue of Section 1559 of the California Civil Code. Had counsel done so, it would have been a simple matter for us to answer such arguments. If the salutary rule heretofore announced by this Court is to be abandoned the work of this Court will be greatly increased, since litigants, unsuccessful in the District Court, will be encouraged to appeal even without available grounds, in the hope and expectation that this Court will go outside the briefs to develop arguments of its own upon which to base a reversal. Such arguments may be sound due to the superior legal knowledge of the members of this Court, but, on the other hand, they may be unsound for the reason that they do not have the additional guarantee of accuracy which comes from being subjected to the acid test of argument.

The treasury of appellant, as is apparent both from the findings of the District Court and from the opinion of this Court, had been looted by Hays, Diehl and Wise, the latter acting for and as the corporation, with the result that the numerous small creditors of appellant, who furnished credit in reliance upon the supposition that appellant either had valuable patents or if sold would receive their equivalent, have

been defrauded and are still unpaid. Upon learning that appellant had transferred its patents for the consideration provided in the iniquitous contract of "The Unholy Three", some of the creditors selected three of their number to petition the District Court to have appellant adjudicated bankrupt.

In no other way was it practical for the creditors to obtain their just dues than to have a trustee in bankruptcy appointed who could act for all and at the common expense.*

Two concealments of assets were alleged as grounds for adjudication in the amended petition: (1) The concealment of a contract made in behalf of appellant by Hays, Diehl and Wise under which appellant's valuable patents were transferred, which contract was ratified by the corporation,† and (2) The concealment of certain moneys arising from the sale of tools and equipment of appellant. Both concealments were alleged to have been made with intent to hinder, delay and defraud creditors, and to have extended into the four months period prior to bankruptcy.

A hearing upon this petition was had in the District Court which adjudicated appellant bankrupt upon

*Judge Wilbur's opinion intimates that appellees' redress as creditors and that of the stockholders of appellant is in the nature of a cause of action for the transfer of appellant's patents without consideration. It is possible, therefore, that this Court may feel that its reversal of Judge St. Sure's decision is not the complete deprivation of redress to defrauded creditors, which as a practical matter it is. The judicial conscience, if an injustice has been done, cannot be thus relieved from the responsibility for its present decision. Exalted though this Court may be, it must nevertheless, like ordinary mortals, take into consideration matters of practical necessity, and face the bald, unvarnished fact that if its present decision stands the creditors of this bankrupt corporation will be unable to collect their claims notwithstanding the fact that appellant has assets which could be reached through the medium of a trustee in bankruptcy.

†Petitioners did not know of the supplemental contracts until the trial.

findings of which the following are the ones most pertinent to the present petition: (1) That the proceeds of the sale of appellant's tools and equipment were concealed in a bank deposit in the name of an employee; (2) That the right flowing to appellant from the Hays, Diehl and Wise contracts were assets of appellant; (3) That these concealments were with the intent to hinder, delay and defraud creditors; and (4) That these concealments continued from the time of their commission to within four months of the filing of the original and amended petitions.

Upon appeal from Judge St. Sure's decision, this Court, contrary to the rule as to the finality of the trial Court's findings where based on conflicting testimony, has entirely disregarded findings (2) and (4) set forth above and has reversed the adjudication upon the following new and independent findings, all of which are either contrary to the weight of the evidence or entirely without support in the evidence: (1) That Wise was not the *alter ego* of the corporation, that appellant had no part in the contracts which disposed of its patents, and, impliedly, that the making of the contracts by Wise was not the act of the corporation, and that they were never adopted, ratified or acted upon by the corporation; (2) That the contracts were not an asset of the corporation; (3) That the contracts were concealed from and not by the corporation; and (4) That the hidden proceeds from the sale of appellant's tools and equipment had all been paid out to creditors prior to the four months period.

A rehearing is now sought for the reasons: That this Court has transcended its true functions by treating an equity appeal as a trial *de novo;* that its decision is based upon newly found facts for which there is either no support in the record or which are directly contrary to the weight of testimony; that it has found that the contracts were not the contracts nor an asset of appellant and were not concealed by appellant upon the erroneous assumption that the acts of Wise, who dominated and controlled the corporation, were not acts of the corporation, and upon the further erroneous assumption that the corporation had never adopted or ratified them; that it was erroneously decided even upon its own erroneous findings that the concealment of a contract for the benefit of a third party is not the concealment of an asset of the third party; that it has erroneously assumed, contrary to the findings of the District Court and without any support in the record, that the proceeds of the sale of appellant's tools were all paid out to creditors; and that it has erroneously decided even upon its own erroneous findings that concealment of an asset of the bankrupt is cured as an act of bankruptcy by the disappearance of the asset.

I.

OF THIS COURT'S NUMEROUS ERRORS OF FACT AND LAW WITH REGARD TO THE CONTRACTS.

1. **That the contracts of "The Unholy Three" were adopted, approved and ratified by appellant not only appears from the evidence, but also was found by the District Court, and is apparent on the face of this Court's own opinion. Hence even under this Court's theory of the law the contracts were assets of appellant, concealment of which constituted acts of bankruptcy.**

The opinion of this Court states that the contract of February 27, 1930, and the two supplementary contracts of May 8, 1930, and September 1, 1930, were contracts between Wise, Diehl and Hays to which appellant was not a party and that it is a confusion of legal terms to say that appellant owned these contracts. The opinion further states that until appellant exercised its option to receive the benefits, if any, flowing from the contracts, its rights and the rights of its creditors and stockholders arose by reason of the transfer of its patents without consideration. The Court furthermore cites Section 1559 of the California Civil Code to the effect that a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it, and assuming that there was no approval or election to adopt the contract by appellant, concludes that the corporation had no asset in the contract which could be concealed.

We submit that it does not logically follow from the provisions of Section 1559 of the Civil Code that appellant's only right under a contract for its benefit was to enforce it prior to rescission and to elect to

receive its benefits. Assuming, however, that this were the case, the conclusion reached by the Court is, nevertheless, erroneous, since essential premises of its argument are lacking, namely, that the corporation has not elected nor exercised its option to receive the benefits of the contract and that the corporation had not by ratification made the contracts its own.

If we assume the correctness of the announced rule of law, then the finding of Judge St. Sure that the contracts were assets of the corporation must, under the rule that findings will be construed to support the decision, be read in the light of that law. If, therefore, it was necessary that the contracts be approved, adopted or ratified by the corporation, then the finding that they constituted an asset implies the finding that the contracts were so adopted, approved and ratified by the corporation.

The evidence to support such a finding is clear and convincing. The original contract was made on February 27, 1930, and the two supplementary contracts on May 8, 1930 and September 1, 1930. On December 26, 1930, the stockholders of appellant executed a document entitled "Stockholders' Approval of Assignment of Patents and Patent Applications" by which the transfer, conveyance and assignment of all the patents theretofore made by Wise Manufacturing Company and/or the officers of the corporation was ratified, confirmed and approved, said ratification, confirmation and consent being described as "irrevocable and in no way dependent upon any condition or conditions whatsoever". The document further stated that it

vested complete and unconditional title in Wise Patent and Development Company of all the patents to the extent of any ownership of any legal or equitable interest which the stockholders of Wise Manufacturing Company or any of them might have therein. This document was signed as described on the face of the document by all of the stockholders of Wise Manufacturing Company, namely, by Standard Die & Tool Company Inc., by Roy T. Wise, President, and Pansy Wise. (46, 47.) The only other stockholder was Roy T. Wise himself who had made the contract and who had executed a transfer of patents dated May 8, 1930. (169.) Standard Die & Tool Company who owned the legal title had made an assignment on May 5, 1930 of certain of these patents. (169.) Under date of May 5, 1930 appear resolutions of Standard Die & Tool Company, directing that company to sell, assign and transfer the patents to Wise Patent and Development Company.

Most surprising of all, in the light of the actual decision of this Court, is the statement appearing on the face of its opinion that Standard Die & Tool Company, in which was the legal title, had authorized the transfer of the patents, and that appellant, in which was the equitable ownership, had approved the transfer.

Is it to be assumed that appellant elected to approve the transfer of its patents to Hays, Wise & Diehl, but waived all consideration passing to it therefore?

How, in view of the above findings of two Courts, and the clear and uncontradicted evidence of approval,

adoption and ratification by appellant, can it be said that appellant had no asset in these contracts or that they were contracts of Hays, Wise & Diehl and not of or adopted by appellant.

2. **This court's erroneous theory of the law that a third person for whose benefit a contract has been made has no asset therein but only a right to elect to receive the benefits of the contract and to enforce it until rescinded.**

The only authority cited by this Court in support of its conclusion that appellant had no asset in the contract until it elected to receive the benefits thereunder is Section 1559 of the California Civil Code. It does not logically follow, however, from the statutory provision, that the contracts did not constitute an asset of appellant prior to adoption. The mere statement that the third party may enforce the contract until it is rescinded does not necessarily mean that that is the third party's only right. The statute in question is a mere statement of one of the rights of the third party.

Undoubtedly appellant had a number of causes of action arising out of these transactions which appellant might at all times have enforced and which its trustee in bankruptcy might now enforce. It will not be seriously contested that a right of action is not an asset nor can it be contested that appellant through its officers deliberately and effectively concealed from its creditors the existence of such causes of action. It may be that the primary purpose of Wise, as president and a director of appellant, was to advance the selfish interest of Wise, the individual. There was a

secondary purpose, however, and that was to hinder, delay and defraud appellant's creditors. This was a corporate purpose.

3. **The contracts even if unadopted by appellant and now subject to rescission by the nominal parties thereto, have in fact never been rescinded, and even under this Court's interpretation of the law, still constitute an asset enforceable by appellant or its trustee in bankruptcy.**

Even though we grant every premise assumed by this Court relative to these contracts, the fact still remains that up to the present time the nominal makers of those contracts have never rescinded them. Appellant, therefore, has the right at the present time to adopt or readopt these contracts and to sue thereon for the benefit moving to appellant thereunder. Concealment of this present and existing right constitutes the concealment of an asset of appellant and in and of itself constitutes grounds for adjudication.

4. **This Court erred in holding that Wise was not the alter ego of appellant, in concluding therefrom that his knowledge and acts were not the knowledge and acts of appellant, that his contracts were not contracts nor an asset of appellant and that the concealment of the contracts were concealments from and not by appellant.**

Not the least important of the errors which we submit this Court has committed in its present decision is contained in the following statement in the opinion:

> "The trial court found that Wise acquired all the outstanding stock of appellant about May, 1930, and ever since the corporation has been his alter ego. This finding must be read in the light of the fact that the Standard Die and Tool Company owned 4670 shares of the stock of the Wise

> Manufacturing Company and that the outstanding stock referred to in the finding is the 271 shares which were owned by others. The Standard Die and Tool Company still has outstanding some of its preferred stock. Consequently, it cannot be said that either corporation was the alter ego of Wise or that the contracts of Wise were the contracts of these corporation."

On the strength of the above statement this Court has divorced each and every act of Wise whether individually or in the name of the corporation as an act of the corporation and has likewise eliminated all knowledge of Wise as knowledge of the corporation.

The importance of this rejection of the lower Court's findings cannot be too greatly emphasized, since without it the elaborate sophistry by which this Court comes to the conclusion that appellant had no part in the contracts, that it never adopted the contracts nor elected to receive their benefits, that it had no knowledge of the contracts, and that it never concealed them, but on the contrary the contracts were concealed from it, must assuredly fall of its own weight.

The surprising thing is that in another part of its opinion this Court has set forth facts clearly showing that Wise was the *alter ego* not only of appellant but of both corporations. On page iii of the opinion appears the following statement:

> "Wise owned much more than a majority of the stock of the Standard Die and Tool Company which owned nearly all of the stock of the Wise Manufacturing Company. By reason of this stock

ownership Wise dominated both corporations. He was president of both, and controlled the Board of Directors."

In the light of the decisions which will hereafter be cited to the effect that it is control and domination of the corporation and lack of, or absence of the exercise of the power of restraint, and not necessarily complete stock ownership, which determines whether or not a person is the *alter ego* of a corporation, we submit that this Court has clearly contradicted itself, in that in one place in its opinion it recites facts showing that Wise was the *alter ego* of appellant and in another place in the opinion states that it cannot be said that the corporation was the *alter ego* of Wise.

Moreover the finding of Judge St. Sure on this subject was clear and succinct and is supported by clear and convincing testimony. Judge St. Sure found that in May, 1930, Wise acquired all of the outstanding common stock of appellant and is and ever since said time has been to all intents and purposes the Wise Manufacturing Company. (37.) The testimony clearly shows that the entire outstanding stock of appellant was 4941 shares of common stock. (53.) Of this stock 4670 shares stood in the name of Standard Die and Tool Works. (53.) The remaining 271 shares were acquired and paid for through the escrow. (125.) Standard Die and Tool Works' stock consisted of 694 shares of common stock and 263 shares of preferred stock. Of the common stock Wise owned 660 shares and his wife Pansy Wise owned 34 shares. (52, 171.) Wise therefore owned or controlled 100% of

the common stock of Standard Die and Tool Co. The only stock in either corporation owned or controlled by others than Wise was 258 of the 263 shares of preferred stock of Standard Die and Tool Company. Under any interpretation this was complete control and domination of appellant corporation and lack of the power of restraint in any one else so far as stock holding was concerned.

The record shows, however, in so many words, that Wise controlled and boasted he could control and could cause any purpose agreed upon in the contract of February 27, 1930, to be executed by Wise Manufacturing Company and the Standard Die & Tool Company Inc. (54.)

To assert that under circumstances such as are above described and found, that the acts and knowledge of the stockholder is not the act and knowledge of the corporation is contrary to equity and justice and to the overwhelming weight of judicial opinion.

The legal fiction of the corporate entity is after all only a fiction and where that fiction, as here, can serve no purpose but to accomplish injustice and to screen the corporation from the just consequences of its wrongs, the legal fiction will never be permitted to prevail against real substance.

The leading case in this connection is that of *State v. Standard Oil Company*, 49 Ohio State, 137, 13 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541. In that case a group of stockholders, comprising practically all of the outstanding stock holdings of the corporation, entered into a certain illegal and monopolistic

trust agreement in their individual capacities in order to conceal the real nature of their action. The property and business of the corporation were affected in the same manner as if their action had been done in the name of the corporation and by formal resolution of the board of directors. Just as is suggested by the Court here, although appellant did not have the temerity to urge it, the corporation argued that the legal entity as such was not affected by acts or agreements of the stockholders. The Court disregarded this argument and held in substance that the acts of the stockholders were in legal effect the acts of the corporation. In so deciding, Judge Minshall said:

> "* * * All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim, *in fictione juris subsistit aequitas,* is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction they have always been disregarded by the courts. * * * 'It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' * * * 'They were invented for the advancement of justice, and will be applied for no other purpose'."

To hold that the acts of Wise, the President and a director of appellant and of the corporation which owned all of its stock, except that portion which was owned by Wise and his wife, and who had complete control and domination of appellant and boasted of this fact, there being no power of restraint in any

one else, were not the acts of the corporation in order to permit the corporation to conceal assets from its creditors, would be subversive of the ends of justice.

This was clearly brought out by the United States Circuit Court for the Eighth Circuit in *Badders Clothing Co. v. Burnham-Munger-Root D. G. Co.*, 228 Fed. 470. In that case, a petition in bankruptcy had been filed against the corporation, charging preferential payments to creditors when insolvent and concealment of the corporation's property, with intent to hinder, delay and defraud creditors. The adjudication was granted and sustained in the Circuit Court in spite of the contention made that the acts claimed to be acts of bankruptcy were those of one George S. Badders for his own personal benefit and should therefore not be attributed to the corporation.

The facts were identical with those in the instant case, as is brought out by the following language of Circuit Judge Hook:

> "Badders was the *president of and dominated the company. He exercised unrestrained control over its affairs. If the power of restraint was elsewhere, it does not appear to have been exercised. Neither the directors nor other stockholders, if there were any with substantial holdings, interfered.* He was practically the corporation in the conduct of its business. The evidence shows a plan and purpose to defraud its creditors which were in course of accomplishment when arrested by the bankruptcy proceedings. Its stock of goods was being sold, in some instances at a sacrifice, and the proceeds taken by Badders and used in such ways as to put them beyond the

reach of corporate creditors. *If a corporation engages in a plan to hinder and defraud its creditors by concealing or transferring its property, the proof is primarily found in the conduct of its officers in authority, and where part of the plan is their individual enrichment at the expense of the creditors, the distinction between official and personal acts should not be drawn too nicely.* The ultimate disposition of the corporate property or its proceeds, however made, may be the very effective act which was intended to hinder or defraud the creditors. Having ventured upon the wrongful course, it may even act through agents who have no official relation to it. We are not now speaking of contracts ultra vires. Nor does it follow that every wrongful act of an officer is the act of his corporation. It may be unauthorized or be a trespass upon the corporate rights. But if the officer acts within the authority with which he has been clothed and others are injured, the same consequences follow as in the case of a natural person. *It is worthy of note in this case that the bankrupt joined Badders individually in resisting preliminary efforts in the bankruptcy court to uncover the transactions and disclose corporate assets.*" (Italics ours.)

If we should use the name "Roy T. Wise" instead of "George S. Badders" in the foregoing quotation, it would be difficult for one conversant with the facts of the instant case to discover that Judge Hook's opinion was not written herein.

In the final analysis, the only ground upon which this Court has held Wise not to be the *alter ego* of appellant is that some 258 shares of the preferred

stock of Standard Die & Tool Company, were owned by persons other than Wise. Complete ownership and control of all the stock, however, is not essential to a determination that a certain person is the *alter ego* of the corporation. Such determination depends of course to a large measure upon the matter of the stockholdings, in that the stock ownership normally indicates control, but complete ownership is not an essential feature. The essential elements are control and domination of the corporation, and absence of the power of restraint.

In the *Badders Clothing Company* case, supra, it appears that there were other stockholders besides George S. Badders, which is sufficient indication that it is not essential in the Eighth Circuit that all the stock must be in the one man to hold him the *alter ego* of the corporation.

In *McCormick Saeltzer v. Grizzly etc. Co.*, 74 Cal. App. 278, 285, the Court says:

> "In order to cast aside this legal fiction 'the law is not scrupulously particular in discriminating between the contracts of *one who practically owns all the stock of a corporation and controls its affairs*, as to whether he has executed a contract relating to the corporate business in his individual or corporate capacity'. (Swarz v. Burr, 43 Cal. App. 445 (185 Pac. 411).)" (Italics ours.)

Nor does the fact that Wise's control came through the stockholdings of Standard Die and Tool Company, which he in turn controlled, affect the situation.

United States v. Milwaukee Refrigeration Transit Company, 142 Fed. 247 at 253 to 256.

If this Court recognizes, in view of the above uncontroverted facts and the law cited, that it has erred in not holding Wise the *alter ego* of appellant, it will, we submit, recognize that it has likewise erred in concluding that the contracts were not contracts of appellant, that they were not an asset of appellant and that they were not concealed by appellant.

Before passing to our next topic, we would like to call the Court's attention to the fact that even eliminating the *alter ego* doctrine from consideration, the record discloses that the corporation acting in its official capacity was an actual party to and not merely a third party beneficiary of the contracts. By resolution of April 11, 1930, it appears that Wise had asked authority to negotiate a loan in the corporation's name pending the sale of the corporate assets to Diehl and Hays et al. (105.) Such a resolution was passed authorizing the president and secretary to execute the required document in the corporate name and under the corporate seal. (105.) We submit that this in and of itself clearly shows knowledge of the corporation of the proposed sale and that the corporation was authorizing Wise to deal concerning the transfer of its patents. In appellant's minutes of January 27, 1930, appears the statement that Wise had discussed with the directors his conference with Mr. Hays and discussed the probability of an outright sale. (103.) Can it be said in the light of these minutes that the corporation was not a party to the deal eventually made by Wise, just because in making the sale he incidentally tried to make a personal profit?

We further submit that the language of the contract of February 27, 1930, is such that it purports to bind the appellant corporation and further that it was not necessary to constitute this contract the contract of the corporation that it be adopted by the corporation.

In order to make the contract the contract of appellant and to give to it the benefits thereunder, it is erroneous to treat it simply as a third party beneficiary which would have to elect to receive such benefits before they became an asset. On the contrary, once this contract was executed appellant had the right to reject the same rather than the right to elect to accept it.

The Court's present opinion is tantamount to a holding that because Wise, Hays and Diehl attempted to deprive the creditors and other stockholders of a large portion of the consideration for their patents that therefore appellant is to be deprived even of the pittance which the freebooters Hays and Diehl and the violator-of-his-trust Wise were willing to accord it.

In urging in the foregoing discussion that the contracts were to the extent indicated and for the present purpose contracts of the corporation, we do not wish the Court to lose sight of the further and controlling argument that the actual transfer of the patents by appellant was sufficient to constitute an adoption by it of the contract, nor do we wish to be of record as admitting that the trustee in bankruptcy may, if he so desires, elect to set aside the contracts as being obtained by fraud.

II.

OF THIS COURT'S ERRORS OF FACT AND LAW WITH REGARD TO THE HIDDEN DEPOSIT OF PROCEEDS OF SALE OF TOOLS AND EQUIPMENT OF APPELLANT.

1. The Circuit Court's unusual procedure in determining a bankruptcy appeal by trying the facts de novo has already been demonstrated. Its finding that the proceeds of the sale of appellant's tools and equipment were all paid out in preference to creditors is an extraordinary illustration of this procedure. Herein of its misinterpretation of the stipulation.

It is admitted, and both Courts find, that approximately $600.00 of appellant's money was deposited in the personal bank account of Huldur Jacobsen, appellant's stenographer, in order to avoid attachment by creditors (i. e., to hinder and delay if not to defraud creditors).

It is well established that an existing state or condition will be presumed to remain the same until proof is brought to establish the contrary, or that the object or purpose of the state or condition once in existence is completed.

Sheldon v. Gesellschaft, 28 Fed. (2d) 449.

We submit that there is no evidence in the record to show that any portion of this money was paid as preference to creditors of appellant or that the purpose of the concealment has been accomplished.

Appellant attempted at the trial to establish the lacking proof by stipulation, but an examination of the record with reference to the attempted stipulation shows that nothing was agreed to beyond the fact that $184.85 went to pay attorneys' fees (but it is not

shown that they were attorneys' fees owing by appellant), and $345.55 was withdrawn by Huldur Jacobsen from the bank account (but it is not shown that this $345.55 was applied by her to the payment of salary or that appellant was indebted to Huldur Jacobsen for salary). The balance of the fund, consisting of some $81.60, was not even attempted to be explained.*

The District Court, which heard the stipulations in the course of their making, had no difficulty in construing them correctly, as above set forth. The District Court was also able to estimate the importance of appellant's failure to put Wise or Miss Jacobsen on the stand to supply the obvious defects in appellant's proof. It, therefore, had no difficulty in making the finding that the sum of $612.00 was an asset of respondent and was concealed by respondent and that the concealment continued from the time of its original commission up to within four months of the bankruptcy.

If this Court's decision on the law is correct, then this finding must be read in the light of additional implied findings that the attorneys' fees paid were not attorneys' fees owing by appellant, that Huldur Jacobsen was not a creditor and the sums now in her possession were not applied to the payment of her salary, that the balance of the fund is entirely unexplained and is still in Huldur Jacobsen's possession, and that the entire fund can be recovered from the

*This Court will not deny that the amount of the concealment does not affect the act as an act of bankruptcy. Even $1.00 concealed would be sufficient for the adjudication.

persons holding it, or who received it, by the trustee in bankruptcy.

This Court, however, in an obviously inferior position to the judge who tried the case, in that it had no background upon which to guide its reasoning, has jumped to the conclusion that all of the fund was paid to creditors as preferential payments, although counsel for petitioners carefully refrained from admitting that any part thereof was so applied.

An examination of the record in this regard may be enlightening: As petitioners began to develop their proof as to this fund, Mr. Clark, counsel for respondent, interrupted with a suggestion that a stipulation as to the facts be made. (75.) He then stated that he had a letter from Miss Jacobsen, showing her withdrawals of the final balance of the fund in 1931, and that she had charged that balance against a claim for unpaid salary, etc. (75, 76.) Mr. Clark's narration of the facts was nothing more than an offer to stipulate, which was refused by Mr. Resleure, who stated: "I do not think I can go as far as that with the stipulation." (76.)

Mr. Resleure then offered to state how far he was willing to stipulate but was interrupted by Mr. Clark, who stated he had a letter from Mr. Sorrick, manager of the Berkeley Branch of the Bank of America. Thereupon Mr. Resleure asked to be shown that letter, but it was not produced. Instead, Mr. Clark said, "I will show you the letter from the lady." Mr. Resleure stated he was not interested in the lady's letter,

that she should be in Court for cross-examination. (76.)

Mr. Clark next stated ex gratia that when she got down to $430.00 she took the balance and said that he had Miss Jacobsen's and Mr. Sorrick's letter. Neither letter went into evidence and there was no stipulation consenting to Mr. Clark's statement. (76.)

Thereupon, the following was agreed to by both counsel:

> An account was opened in the name of Huldur Jacobsen on June 25, 1931. Deposits totaled $612.00. The account was closed November 23, 1931, by the withdrawal of the then balance of $430.00. The funds deposited in the name of Huldur Jacobsen represented monies of appellant and were derived from the sale of tools belonging to it. The object of putting the fund in this account was to prevent creditors of appellant from ascertaining its existence and to avoid it being attached by creditors. (76, 77.)

Mr. Clark then asked that it be stipulated that the account was closed in the manner indicated by Miss Jacobsen's letter. Mr. Resleure stated he would not go that far and that he would like to have Miss Jacobsen to cross-examine her as to what happened to these funds. (78.)

Then follows a further attempt by Mr. Clark to get the stipulation as to what was done with the funds, but no consent thereto was given by Mr. Resleure except that he corrected the original stipulation as to the balance being $530.00, and not $430.00. (78, 79.)

It was then stipulated that the $530.00 was withdrawn by Huldur Jacobsen but it was not agreed for what purpose or how it was applied.

Again Mr. Clark attempted to secure a stipulation that the money was applied to the payment of salary, but Mr. Resleure stated:

> "We won't stipulate that the $184.85 went to pay attorneys' fees and we won't stipulate that the $345.55 went to pay prior salaries." (80.)

It was, however, stipulated that Huldur Jacobsen took the money and Clark, Nichols & Eltse have not been able to collect it,* and that $184.85 was received by Clark, Nichols & Eltse on account of attorneys' fees but it was not agreed that the attorneys' fees mentioned were owing by appellant.

As to the $184.85 received by Clark, Nichols & Eltse as attorneys' fees, there is no showing that these attorneys theretofore performed legal services for appellant. They had, however, performed services for Wise, individually, in connection with the attempt to freeze out the stockholders through the escrow. In view of the District Court's finding that the entire amount is an asset, it may well be that the District Court assumed that Clark, Nichols & Eltse received appellant's money to pay Wise's personal bill. If so, the $184.85 is still recoverable from Clark, Nichols & Eltse.

The $345.55 went to Miss Jacobsen, but inasmuch as there is no showing that she was a creditor or that

*This statement that the attorneys had tried to get back the money indicates that Miss Jacobsen was not entitled thereto.

she was entitled to or did apply the money to the payment of salary, this portion of the fund is still recoverable from Miss Jacobsen by the trustee in bankruptcy, in so far as the present record is concerned.

As to the remaining $81.60, there is no showing what was done with it. The fund was depleted by that amount, but there is no showing what was done with it. We may therefore assume that as to the $81.60 it is still in Miss Jacobsen's possession, or that she used it for purposes of her own and that it is still recoverable. As previously stated, it needs only $1.00 to be concealed to constitute an act of bankruptcy.

With all due deference to this Court, we are frank to say that in a case of this kind, where the lower Court has described the entire case and the transactions referred to as "tainted with fraud and concealment, warranting a full and complete investigation through the process of the bankruptcy Court," and, where, as a practical matter, innocent creditors have no other means of redress than through the processes of the bankruptcy Court, we are amazed to find such a strange construction of this stipulation exerted in order to deny an adjudication which, if granted, will protect innocent creditors and which, if denied, will protect a guilty and fraudulent bankrupt and preserve to the looters of the treasury of that bankrupt their ill-gotten profits.

2. **The Court's error in holding that concealment terminates upon disposition of the fund concealed.**

Even assuming that the fund had disappeared and could not now be recovered, this Court's decision would still be erroneous.

There is absolutely no authority to support the Court's ruling that a concealment ends as an act of bankruptcy with the paying out of the fund. This Court cites no authority for this proposition of law. Appellant was unable to cite any authority in support of the same contention, except two cases which were clearly not in point. Appellees, however, cite cases to the effect that an act of concealment is complete when performed and that it is not necessary to a fraudulent concealment that the money should be retained for any definite or indefinite time.

Kalin v. United States, 2 Fed. (2d) 58, 59;
United States v. Knickerbocker, 66 Fed. (2d) 388, 390.

These cases cited by appellees were bankruptcy cases but were of a criminal nature. They constitute, however, persuasive authority.

We know of but one case in the law where proof of the *corpus delicti* is necessary to establish guilt. That exception to the general rule is in the case of murder. In all offenses, such as larceny, burglary, embezzlement, obtaining money under false pretenses, which minor misdeeds are more nearly akin to the acts of appellant and "The Unholy Three" in this case, the act is sufficient. It is not ordinarily necessary to pro-

duce the fund or to show that it still constitutes an asset that can be recovered.

We submit that if this new rule announced by this Court should be allowed to stand the Ninth Circuit and the enormous territory over which its judicial determinations constitute the law will become the Mecca and haven of that not least of the parasites on modern business—the crooked and corrupt bankrupt.

If this new rule of law is to stand, then Moses and Brother (of General Average fame) may hereafter open up in any city or town in the Ninth Circuit, contract debts for merchandise, sell his stock and conceal all proceeds (possibly in the name of his mythical brother), and to his innocent creditors, who may seek to have his operations investigated by the Bankruptcy Court, give the age-old gesture of ridicule and defiance, provided he can establish that he no longer has the money.

Such is not, never has been, and should not be the law. With all the recent attempts to correct evils in bankruptcy procedure and practice, it is certainly to be deplored if this Court should allow itself to remain on record as depriving creditors of their remedy through the processes of the Bankruptcy Court by this newly announced doctrine, the product of pure sophistry on the part of this Court.

We further submit that the decisions do not support this Court's statement that the purpose of confining acts of bankruptcy to the four months' period is in order to facilitate the recovery by the trustee in bank-

ruptcy of the property which has been concealed. The four months' doctrine is one which establishes any preferential transfer as a presumptively fraudulent preference. It has never been the rule that the trustee cannot go back of the four months' period and by proof of actual fraud recover back for creditors the fraudulently transferred asset.

CONCLUSION.

In conclusion, we crave indulgence, if, in our ardor, begotten of a consciousness of a serious injustice we feel has been done, not only to our clients, but to numerous other creditors, we have failed to soften with conciliatory phrases our comments on the opinion of this Court.

We believe that these innocent victims of the corrupt manipulation of appellant's business and assets have no practical redress except through the processes of the bankruptcy Court.

We believe that an injustice has been done to Judge St. Sure, whose carefully considered decision this Court has reversed in the unusual manner we have described.

We believe that the present opinion of this Court, if allowed to stand, opens the way for untold appellate litigation by litigants who will feel that the findings and decision of the lower Court mean nothing in this type of appeal.

We believe that the present opinion of this Court, if allowed to stand, opens a way for every fraudulent bankrupt to carry on without fear of investigation by the bankruptcy Court and without prospect in most cases of being deprived of his ill-gotten gains.

We believe that if ever the remedy of a rehearing, provided for in the rules of this Court, should be granted, it is in this case.

We pray that our petition be considered and that it be granted.

Dated, San Francisco,
August 16, 1935.

RESLEURE, VIVELL & PINCKNEY,
FLOYD B. CERINI,
EUGENE R. ELERDING,
Attorneys for Appellees and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of the attorneys for appellees and petitioners in the above entitled cause, that in my opinion the foregoing petition for rehearing is well founded in point of law as well as in fact, and that said petition for rehearing is not interposed for delay.

Dated, San Francisco,
August 16, 1935.

J. F. RESLEURE,
Attorney for Appellees and Petitioners.

No. 7639

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United States

Circuit Court of Appeals

For the Ninth Circuit.

ESTATE OF WINIFRED H. KINNEY, Deceased, by SHERWOOD KINNEY and R. C. GORTNER, Executors,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

FEDERAL PRINTING AND COMPOSITION COMPANY, SAN FRANCISCO, CALIFORNIA

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Petitioner:

R. T. GORTNER, Esq.

For Respondent:

W. F. GIBBS, Esq.,

T. M. MATHER, Esq.

Docket No. 49582

ESTATE OF WINIFRED H. KINNEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1930

July 16—Petition received and filed. (1) (Fee not paid.)

July 23—Fee paid (check).

Aug. 15—Order to show cause on or before Sept. 10, 1930, entered. (Imperfect.)

Sept. 5—Amended petition filed by taxpayer.

Sept. 8—Copy of petition served on G. C.

Sept. 10—Hearing had on order to show cause, vacated. Amended petition received.

Sept. 10—Order that order to show cause be vacated, amended petition be served, respondent given 60 days to answer or forty-five days to move in respect thereto, entered.

1930

Sept. 17—Copy of petition served on G. C.

Oct. 28—Answer filed by G. C.

Oct. 30—Copy served on taxpayer, assigned to Circuit Calendar.

1933

Aug. 2—Hearing set week 9/11/33 at Long Beach, California.

Sept. 18—Called 9/11/33. Hearing had before Hon. W. C. Lansdon, Div. 8. Submitted on merits. Stipulation of facts with exhibits attached filed. Briefs due 11/20/33.

Nov. 10—Brief filed by taxpayer.

Oct. 31—Transcript of hearing 9/18/33 filed.

1934

May 1—Opinion rendered. W. C. Lansdon, Div. 8. Decision will be entered for respondnt.

May 5—Decision entered. W. C. Lansdon, Div. 8.

July 30—Petition for review by U. S. Circuit Court of Appeals, 9, with assignments of error filed by taxpayer.

Aug. 23—Proof of service filed by taxpayer.

Sept. 7—Praecipe with proof of service thereon filed.

Sept. 26—Order enlarging time to October 15, 1934, for transmission of record entered [1*]

In the Matter of the Estate of Winifred H. Kinney, Deceased.

Date of Death, December 6th, 1927.

MT-ET-C1.-4068-REW.

District of 6th California.

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*Page numbering appearing at the foot of page of original certified Transcript of Record.

PETITION TO THE U. S. BOARD OF TAX APPEALS FOR REDETERMINATION OF DEFICIENCY.

To the Honorable United States Board
of Tax Appeals,
Earle Building,
Washington, D. C.

The undersigned, executors of the Estate of Winifred H. Kinney, deceased, hereby petition your Honorable Body for a redetermination of the deficiency in the above entitled proceeding.

By letter of May 27th, 1930, from the Honorable Commissioner of Internal Revenue, entitled as above set forth, to these executors, the deficiency in Federal Estate Tax was determined in the amount of $3,968.07, and was explained in a statement attached to said letter consisting of one page.

The undersigned executors do not acquiesce in said determination, but petition hereby for a redetermination of said deficiency.

The deceased Winifred H. Kinney, whose death occurred on December 6th, 1927, was the beneficiary of a trust created by Abbot Kinney on October 28th, 1918, the term of which trust was during the life of said Abbot Kinney and for twelve years after his death. A copy of the trust declaration has been heretofore filed by the undersigned.

Said declaration of trust provided only for a sharing in the income of the trust estate by the said beneficiary during her life. It did not vest any interest in the corpus of the trust in her. It provided

that at the termination of the trust, and then only, the corpus of the trust property should be divided among the beneficiaries of said trust. It did not provide for any division of the corpus of the trust before the final termination of the trust and it did not provide for any allotment of any part of the trust estate, or of its income, to any successors of any beneficiary in the event of his or her death.

Upon the death of Winifred H. Kinney her right to income from said trust did not pass to anyone as her successor, but ceased. Likewise, no interest in the trust estate having vested in her, no share in the corpus passed from her by inheritance to her children, Clan Kinney and Helen Kinney, but the whole of the corpus remained under the trust for distribution at the termination of the trust among the then existing beneficiaries.

Incomplete. [2]

Abbot Kinney died in 1920; hence the termination of said trust will occur in 1932. Therefore there was no interest in the corpus of the trust estate in Winifred H. Kinney when she died in 1927.

Notwithstanding this a tax has been imposed as if she were during her life the owner of one-ninth of the trust fund. To this the undersigned executors object and protest and ask that said entire tax be annulled and cancelled.

If, however, it be held that Winifred H. Kinney was the owner of one-ninth of the beneficial interest in the trust fund itself, then the undersigned executors object to the valuation fixed for said one-ninth. The entire trust fund consisted of capital stock of

Abbot Kinney Company. The net value of the Abbot Kinney Company and its assets has been properly ascertained and we have no quarrel therewith. A free one-ninth of said assets would be the amount fixed by the Commissioner of Internal Revenue, to-wit, $182,269.14.

But said one-ninth was not a free stockholding. It was not in the possession of the deceased, nor issued in her name. She had no individual rights over it, nor could she sell it or transfer it to anyone. It was not receivable by her until 1932, but was bound to remain until that date impounded in a trust, in which she had no separate or severable ownership.

The valuation of this one-ninth was therefore not a full value of a one-ninth of said trust property, freed from the encumbrances and impairment of said trust, but was some lesser value. The undersigned have submitted evidence that this value would not exceed one-half of the value fixed by the Government officers.

The Honorable Commissioner's letter of May 27th, 1930, with the explanatory sheet thereto attached, apparently recognizes this argument but offsets it by the theory that the trust estate would be augmented by the addition of earnings up to 1932 "sufficient to negative the propriety of discounting it to find its present worth as of the date of the decedent's death." This consideration is improper in fixing the value of the deceased's interest at the time of her death. The income that that interest may

have earned for others thereafter has nothing to do with its proper valuation at her death. For all that appears it may have resulted in losses in the subsequent years, and may yield no income whatsoever; and to assume an increase of value up to the present time or in the next two years is assuming something for which there is no proof and which is for the future problematical.

The undersigned respectfully request that they may be given such opportunity as the rules of the Department provide for further presentation of evidence or argument.

Dated this July 11th, 1930.

Very respectfully,
R. C. GORTNER
SHERWOOD KINNEY
Executors of the Estate of
Winifred H. Kinney, Deceased.
701 Pershing Square Building,
Los Angeles, California.

R. C. GORTNER
Attorney for said Executors.

[Endorsed]: United States Board of Tax Appeals. Filed Jul. 16, 1930. [3]

United States Board of Tax Appeals

Docket No. 49582

ESTATE OF WINIFRED H. KINNEY,
Deceased,
By Sherwood Kinney and R. C. Gortner,
Executors,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

Now comes said estate of Winifred H. Kinney, deceased, by Sherwood Kinney and R. C. Gortner, executors of said estate, and represents to this Honorable Board:

A. That Winifred H. Kinney, deceased, died on December 6th, 1927, in the County of Los Angeles, State of California, being a resident of said county and state; and that thereupon the undersigned, Sherwood Kinney and R. C. Gortner, were duly appointed and qualified as executors of the estate of said Winifred H. Kinney, deceased, in proceedings duly had therefor in the Superior Court of the State of California in and for the County of Los Angeles; and are still such executors.

B. That such proceedings were thereupon had that on, to-wit, May 27th, 1930, the Honorable Commissioner of Internal Revenue, respondent herein,

did determine a deficiency in Federal estate tax to exist against petitioner, in the amount of $3968.07, and did address to and serve upon petitioner a letter of date May 27th, 1930, (a copy of which is hereto appended) notifying petitioner of such determination and of the right of petitioner to file a petition with the United States Board of Tax Appeals for a redetermination of said deficiency.

C. That thereupon on July 11th, 1930, petitioner did transmit to said United States Board of Tax Appeals its petition for redetermination of said deficiency, which was thereupon on July 17th, 1930, duly docketed under the caption and with the docket number hereinabove set forth. [4]

D. That thereupon on August 15th, 1930, order to show cause was duly served upon petitioner, requiring petitioner to prepare and file an original and four copies of a proper petition in accordance with the Board's rules of practice in the above entitled matter; wherefore this petition is now made and filed.

E. The amount of said deficiency is $3968.07; and the nature of the tax is a Federal estate tax, imposed upon the estate of Winifred H. Kinney, deceased, who died December 6th, 1927; and the amount thereof in controversy is the whole of said tax.

F. The Honorable Commissioner of Internal Revenue committed error in determining said deficiency, as follows:

1. There was no property right vested in said Winifred H. Kinney at the time of her death, in

or to any part of the capital stock of Abbot Kinney Company, a corporation; and the Honorable Commissioner erred in holding that she was vested with a one-ninth interest in said stock.

2. If said Winifred H. Kinney was at the time of her death vested with a one-ninth interest in the capital stock of Abbot Kinney Company, a corporation, then her interest therein was subject to a trust, and was not receivable by her or her estate until 1932; and was not equivalent in value to one-ninth of the assets of said corporation. Her interest and that of her estate upon her death, if any, in said stock, was impaired in value by the terms of said trust, so that the true valuation thereof did not exceed one-fourth of the valuation erroneously fixed by the Honorable Commissioner of Internal Revenue.

G. The facts upon which petitioner relies as sustaining the foregoing assignments of error are as follows:

1. The deceased Winifred H. Kinney, whose death occurred on December 6th, 1927, was the beneficiary of a trust created by Abbot Kinney on October 28th, 1918, the term of which trust was during the life of said Abbot Kinney and for twelve years after his death.

2. Said declaration of trust provided only for a sharing in the income of the trust estate by the said beneficiary during her life. It did not vest any interest in the corpus of the trust in her. It provided that at the termination of the trust, and

then only, he corpus of the trust property should be divided among the beneficiaries of said trust. It did not provide for any division of the corpus of the trust before the final termination of the trust and it did not provide for any allotment of any part of the trust estate, or of its income, to any successors of [5] any beneficiary in the event of his or her death.

3. Upon the death of Winifred H. Kinney her right to income from said trust did not pass to anyone as her successor, but ceased. Likewise, no interest in the trust estate having vested in her, no share in the corpus passed from her by inheritance to her children, Clan Kinney and Helen Kinney, but the whole of the corpus remained under the trust for distribution at the termination of the trust among the then existing beneficiaries.

4. Abbot Kinney died in 1920; hence the termination of said trust will occur in 1932. Therefore there was no interest in the corpus of the trust estate in Winfred H. Kinney when she died in 1927.

5. If, however, it be held that Winifred H. Kinney was the owner of one-ninth of the beneficial interest in the trust fund itself, then the undersigned executors object to the valuation fixed for said one-ninth. The entire trust fund consisted of capital stock of Abbot Kinney Company. The net value of the Abbot Kinney Company and its assets has been properly ascertained and we have no quarrel therewith. A free one-ninth of said assets

would be the amount fixed by the Commissioner of Internal Revenue, to-wit, $182,269.14.

6. But said one-ninth was not a free stockholding. It was not in the possession of the deceased, nor issued in her name. She had no individual rights over it, nor could she sell it or transfer it to anyone. It was not receivable by her until 1932, but was bound to remain until that date impounded in a trust, in which she had no separate or severable ownership.

7. The valuation of this one-ninth was therefore not a full value of a one-ninth of said trust property, freed from the encumbrances and impairment of said trust, but was some lesser value.

H. Wherefore petitioner by the executors aforesaid, does pray that the said tax: First, be cancelled in its entirety; or, second, reduced to one-fourth of the amount fixed by said Honorable Commissioner.

ESTATE OF WINIFRED H. KINNEY,
Deceased.
By SHERWOOD KINNEY
By R. C. GORTNER
Executors of the estate of Winifred H. Kinney, deceased.

Address:
701 Pershing Square Building,
Los Angeles, California. [6]

State of California,
County of Los Angeles.—ss.

R. C. GORTNER, being first duly sworn, on oath deposes and says:

That he is one of the executors of the estate of Winifred H. Kinney, deceased, and that he makes the foregoing petition and this verification thereof for and on behalf of said estate and for and on behalf of Sherwood Kinney, his co-executor; that affiant knows the matters and things set forth in the foregoing petition and that the same are true of his own knowledge except as to the matters therein stated on information and belief and that as to said matters he believes it to be true.

R. C. GORTNER.

Subscribed and sworn to before me this 3rd day of September, 1930.

[Seal] H. J. GWARTNEY
Notary Public in and for the County of Los Angeles, State of California. [7]

Treasury Department
Washington

Office of
Commissioner of Internal Revenue
MT-ET-Cl.-4068-REW May 27, 1930
District of 6th California
Estate of Winifred H. Kinney
Date of death—December 6, 1927
Sherwood Kinney, et al., Executors,
Estate of Winifred H. Kinney,
Venice, California.

Sirs:

The Bureau has examined the protest filed on behalf of the above-named estate against the tentative findings set forth in the letter addressed to the executor by this office under date of April 11, 1930. The deficiency in Federal estate tax hereby determined amounts to $3,968.07, and is fully explained in the attached statement, consisting of one page, showing the action of the Bureau with respect to the protest.

In accordance with the provisions of Title III of the Revenue Act of 1926, you are allowed sixty days from the date of the mailing of this letter (not counting Sunday as the sixtieth day) within which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the said Board within the 60-day period prescribed.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed, and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the decision, which has become final, has been made, the unpaid amount of such assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute the enclosed Form 890, waiving (1) your right to file a petition with the United States Board of Tax Appeals and (2) the restrictions on the assessment and collection of such deficiency, and to forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of the Estate Tax Division, Miscellaneous Tax Unit. In the event that you acquiesce in only a part of the determination, the enclosed form of waiver should be executed with respect to the amount of the deficiency to which you agree.

Respectfully,
ROBT. H. LUCAS,
Commissioner.

Enclosures:
Statement,
Waiver—Form 890
md [8]

Treasury Department
Internal Revenue Service
Form 890—Revised Jan. 1929
(886M)

WAIVER OF RIGHT TO FILE PETITION WITH THE UNITED STATES BOARD OF TAX APPEALS AND CONSENT TO ASSESSMENT AND COLLECTION OF DEFICIENCY IN ESTATE TAX.

Note: When executed, this waiver will not extend the statute of limitations for refund or assessment of tax, nor will it be an agreement under the provisions of Section 606 of the Revenue Act of 1928.

To the Commissioner of Internal Revenue,
Washington, D. C.
Attention: (Miscellaneous Tax Unit,
(Estate Tax Division.

The undersigned executor of the estate of Winifred H. Kinney waives his right to file a petition with the United States Board of Tax Appeals for a redetermination of $..... (*deficiency) (*of the deficiency) disclosed by the letter from the Commissioner of Internal Revenue, Washington, D.C., dated May 27, 1930, and bearing the symbols 4068-6th Calif. and consents to the immediate assessment and collection of the amount set forth above.

Signed ..... Date.....
Executor
Street..... City..... State.....
*Strike out words not applicable. [9]

MT-ET-Cl-4068-REW-6th California
Estate of Winifred H. Kinney.

The protest relates to the following item:

	Gross Estate		
Other Miscellaneous Property	Returned	Tentatively Determined	Determined
One-ninth interest in trust created by decedent's husband, Abbot Kinney, dated October 28, 1918	$ 0.00	$201,567.10	$201,567.10

It is claimed that since the decedent had no vested interest in the corpus but only a life interest in one-ninth of the income earned by the trust created October 28, 1918, she had no interest of value taxable for Federal estate tax purposes; and that even if a value arising out of the trust is held to have been transferred by reason of the death of the decedent, such value is not fairly represented by one-ninth of the fair market value of the corpus of the trust but rather this value discounted by at least 50 per centum to reflect the impairment incident to the trust status.

However, the death of the decedent freed the income from one-ninth of the corpus so that it

might be added to the principal of the trust. This income became part of the corpus to be distributed at the termination of the trust not later than 1932; and as part of the corpus this interest so included earned income sufficient to negative the propriety of discounting it to find its present worth as of the date of the decedent's death. It appears, therefore, that the value of the income in which the decedent's interest terminated at the date of her death was equivalent to a capitalization thereof sufficient to maintain the value of her fractional interest in the corpus of the trust. Section 302 of the Revenue Act of 1926 does not contemplate the destruction of property values by subjecting them to a trust status.

The foregoing determination results in the following Federal estate tax liability:

Gross estate	$189,402.22	$393,269.32	$393,269.32
Deductions	221,118.93	211,000.18	211,000.18
Net estate	0.00	182,269.14	182,269.14
Correct tax determined			3,968.07
Tax shown on the return			0.00
Deficiency			3,968.07
Credit for State inheritance tax			934.86
Amount proposed for assessment			3,033.21

The amount proposed for assessment bears interest at the rate of six per centum per annum from one year after decedent's death to the date of assess-

ment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

The instrument signed December 26, 1929, has not been accepted as a waiver in that it is conditional in its terms and fails to specify a definite amount. [10]

Amended Petition Appeal Filed 7-16-30.

[Endorsed]: United States Board of Tax Appeals. Filed Sep. 5, 1930.

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

A. Admits the allegations contained in the paragraph of the petition marked A.

B. Admits the allegations contained in the paragraph of the petition marked B.

C. Admits the allegations contained in the paragraph of the petition marked C.

D. Admits the allegations contained in the paragraph of the petition marked D.

E. Admits the allegations contained in the paragraph of the petition marked E.

F. Denies that the determination of the deficiency tax is based upon errors as alleged in the paragraph of the petition marked F. [11]

G. 1. Admits the allegations contained in subparagraph 1 of the paragraph of the petition marked G.

2, 3, 4, 5, 6, and 7. Denies the allegations contained in subparagraphs 2, 3, 4, 5, 6, and 7 of the paragraph of the petition marked G.

H. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is respectfully prayed that the determination of the Commissioner be approved.

(Signed) C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
LEWIS S. PENDLETON,
Special Attorney,
Bureau of Internal Revenue.
EGS/lmh-10/21/30

[Endorsed]: United States Board of Tax Appeals. Filed Oct. 28, 1930. [12]

[Title of Court and Cause.]

STIPULATION OF FACTS.

It is hereby stipulated and agreed by and between the parties thru their respective counsel that the following facts may be considerd as true:

1. Winifred Harwell Kinney, the decedent, died testate on December 6, 1927, a resident of Santa

Monica, Los Angeles County, State of California, leaving two children, Clan Kinney and Helen Kinney, surviving her. Thornton Kinney, Carleton Kinney, Sherwood Kinney and Innes Kinney are the children of Mr. Abbot Kinney, by a prior marriage. Mrs. Kinney's death occurred more than seven years after that of her husband, Abbot Kinney, who died in November 1920. The last will and testament of Winifred Harwell Kinney was duly admitted to probate by the Superior Court of Los Angeles County, California, and the executors therein named qualified as such.

2. In the Federal estate tax return filed by the petitioners no reference was made to a one-ninth interest in a revocable trust created by Abbot Kinney on the 28th day of October 1918. This trust was created for the purpose of holding the capital stock of the Abbot Kinney Company for a period of 12 years subsequent to the creation of the [13] trust. The trust indenture is in words and figures as follows:

> "(1) This Indenture, made this 28th day of October, 1918, Witnesseth:
>
> (2) That Abbot Kinney of Los Angeles County, California, herein designated the trustee, does hereby covenant and declare that he has and holds the legal title to the following described property in trust for the uses and purposes hereinafter expressed, to-wit:
>
> (3) All shares of stock owned by and all shares standing in the name of Abbot Kinney

on the books of the company in the Abbot Kinney Company, a corporation, organized under the laws of California, and which said title and ownership of shares includes all shares heretofore issued by said company, except three (3) shares.

(4) That said trustee shall have the power to sell, transfer, convey and mortgage all or any of said property, and to receive the rents and profits from said property, and as incidental thereto to manage said property and vote all shares of stock, and to pay and apply said rents and profits for the support and maintenance of the following named persons, in the proportions hereinafter stated, to-wit:

(5) To Thornton Kinney one-sixth (1/6); to Sherwood Kinney one-sixth (1/6); to Innes Kinney one-sixth (1/6); to Carleton Kinney one-sixth (1/6); to Winifred H. Kinney for the support and maintenance of herself, and for the support and maintenance of the two minor children of Abbot Kinney, to wit: Helen Kinney and Clan Kinney, to be controlled and applied by said Winifred H. Kinney, one-third (1/3); provided however that during the life of Abbot Kinney, trustee above named, he shall act as the sole trustee under this declaration of trust, and he being the sole trustor and maker of this trust shall have the power to revoke this trust at any time during his life time, and during his life time he reserves and shall have the right

to receive and to apply one-half of all the rents, income and profits from the property above described for his sole use as he may determine. In case of the death, absence or inability to act of said Abbot Kinney, trustee, such vacancy shall be filled by a board of directors composed of the following named persons, by proper transfers [14] and declarations of trust: Thornton Kinney; Winifred H. Kinney; Sherwood Kinney; Innes Kinney and Carleton Kinney, and in case of death, absence or inability to act of either or any of said five, then such vacancy shall be filled by Clan Kinney and Helen Kinney in the order named, and all such trustees, in turn, shall have and be possessed of all the power under this trust hereinbefore mentioned.

(6) After the death, absence or inability to act of said Abbot Kinney, said board of trustees in all matters may act by a majority thereof with same effect as if all had acted. This trust shall endure for the period of twelve (12) years after the death of said Abbot Kinney, provided that in case of the death of all of the natural persons in being named in this instrument prior to said time, then this trust shall terminate upon said deaths, but shall be effective from date hereof.

(7) Upon the termination of this trust, unless revoked, the title to the whole of said property, so held in trust, shall immediately vest in the above named beneficiaries by title absolute,

in the same proportions above named for rents and profits and the said one-third (1/3) above set forth for the support of Winifred H. Kinney, Helen Kinney and Clan Kinney, will pass to them in equal shares by absolute title.

(8) This trust shall apply equally to all property exchanged or substituted for any of the above-described property with like effect as if particularly described herein.

(9) The beneficiaries under this trust shall not be personally liable for any incumbrance or indebtedness created by any trustee or trustees.

(10) It shall be the duty of the trustee to make reports each year to the beneficiaries, showing receipts and disbursements and to pay over or apply the rents and profits for the use and benefit of the beneficiaries monthly, provided that in determining the net rents and profits, there shall be reserved necessary funds for payment of taxes, assessments, charges and maintenance and repairs.

(11) Winifred H. Kinney, wife of said Abbot Kinney, hereby joins in this instrument, and hereby declares that all of [15] said property transferred in trust as aforesaid is the separate property and estate of said Abbot Kinney, subject to his disposition and control, and hereby renounces all claims to said property as community property or otherwise, and sets the same apart as the sole property and estate of said Abbot Kinney.

(12) This declaration of Trust supersedes and cancels Declaration of Trust dated November 15th, 1917, and all previous declarations of trust which may have been executed by the said Abbot Kinney.

Witness our hands and seals.

ABBOT KINNEY
WINIFRED H. KINNEY

State of California,
County of Los Angeles.—ss.

On this 28th day of October, in the year nineteen hundred and eighteen A. D. before me, Frank W. Kurten, a Notary Public in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Abbot Kinney and Winifred H. Kinney personally known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said County the day and year in this certificate first above written.

FRANK W. KURTEN,
Notary Public in and for Los Angeles County.
State of California.

My commission expires July 16, 1922."

3. In the deficiency letter, from which this appeal is taken, the Commissioner has determined a value of $201,567.10 of a 1/9th [16] interest in the trust created by Abbot Kinney on October 28th, 1918, and the value of decedent's gross estate has been increased accordingly.

4. Petitioner contends that the value of decedent's gross estate should be decreased $201,567.10 on the theory that the trust declaration vested no interest in the corpus of the trust property in any of the beneficiaries thereof until the termination of the trust in 1932.

5. By a codicil to a will executed on October 29, 1927, Mrs. Kinney bequeathed her beneficial interest in the trust to her two children, Clan Kinney and Helen Kinney Gerety.

6. The Abbot Kinney Company is a California corporation. Its general offices are located at Venice, Los Angeles County, Calif., where it at all times material hereto was engaged in the business of selling, purchasing, leasing and operating real estate and summer resort concessions. The capital stock of the corporation being held in trust, no public market for the shares existed.

7. The following is a copy of the balance sheet of the Abbot Kinney Company as of December 6, 1927:

Abbot Kinney Company, December 6, 1927.

Assets:		Corporate Balance Sheet	
Fixed Assets		$ 788,023.12	
Land	$ 912,013.88		$ 912,031.88
Buildings	180,308.88		180,308.88
Machinery	76,244.34		76,244.34
Sub-total	1,168,567.10		1,168,567.10
Less reserve for depreciation	554,192.36	614,374.74	554,192.36
Total Fixed Properties		$1,402,397.86	
Investments—Stock			[17]
Venice Consumers Water Company	187,600.00		118,379.86
Venice Hotel Corporation	205,500.00		80,000.00
Miscellaneous stock	4,320.00	397,420.00	4,320.00
Sinking Fund For funded debt		11,764.16	
Current assets			
Cash		165,902.32	
Notes receivable		13,713.93	
Accounts receivable			
Sales contracts	$ 259,545.30		239,545.30
Concessionaries	66,185.77		20,185.77
Stockholders	22,450.00		22,450.00
Miscellaneous	17,715.32	365,896.44	17,715.32
Inventories			
Bath house stock	25,462.91		25,462.91
Stock in shops	8,072.52	33,535.43	8,072.52
Deferred Charges			
Unamortized discount on bonds	66,229.62		0.00
Prepaid insurance	10,997.06	76,226.68	10,997.06
Total assets		2,464,856.82	
Total liabilities		977,512.91	
Net worth—		$1,487,343.91	

8. The fair market value of the assets of the Abbot Kinney Company on December 6, 1927, was $2,791,616.84. The total liabilities of the Abbot Kinney Company on December 6, 1927, was $977,-512.91. The net worth of the Abbot Kinney Company on December 6, 1927, was $1,814,103.93. [18]

9. Under an agreement of sale executed July 1, 1930, Innes Kinney sold a 1/6th beneficial interest in the Abbot Kinney Trust to Carleton Kinney for $133,000.00. A copy of the agreement of sale is hereto attached and marked Exhibit A.

10. On August 5, 1930, Thornton Kinney sold a 1/6th beneficial interest in the Abbot Kinney Trust to Sherwood Kinney for $133,000.00. A copy of the agreement of sale is hereto attached and marked Exhibit B.

11. The following is a copy of the corporation's balance sheet as of June 30, 1930:—

Assets:	June 30, 1930.
Land, buildings and equipment less reserve for depreciation	$1,185,855.55
Investments	242,145.31
Current assets	290,155.63
Prepaid charges	17,757.82
Total assets	$1,836,546.74

Liabilities.	
Mortgage bonds	$ 348,000.00
Mortgage notes	35,000.00
Other notes	7,000.00
Current liabilities	8,530.14
Capital stock	1,000,000.00
Surplus	438,016.60
Total liabilities —	$1,836,546.74
Net worth—	$1,438,016.60

[19]

12. It is further stipulated and agreed that if Mr. C. C. Hogan, Mr. W. D. Newcomb, Jr., and Mr. Herbert Hertel, were called as witnesses, they would testify as follows:

(a) Mr. C. C. Hogan, Trust Officer, Security-First National Bank of Los Angeles, would testify that in his opinion Mrs. Kinney could not have sold her interest in the trust for more than 50 per cent of the prorata value of 1/9th of the capital stock of the corporation in 1927.

(b) Mr. W. D. Newcomb, Jr., President of the First National Bank, Venice, California, if called as a witness, would testify that the market value of Mrs. Kinney's interest in the trust in 1927 was not in excess of 25 per cent of the fractional net worth of the corporation.

(c) Mr. Herbert Hertel, Manager, Venice Branch, Security-First National Bank of Los Angeles, would testify, if called as a witness, that in his opinion Mrs. Kinney's beneficial interest was

worth 33 and 1/3 per cent of the fractional net worth of the corporation's assets in 1927.

13. It is further stipulated and agreed that this appeal may be submitted for decision upon the foregoing stipulation of facts, no further testimony to be introduced by either party. It is requested that each party be allowed sixty days from September 11, 1933, within which to file briefs.

R. C. GORTNER
Counsel for Petitioner.

E. BARRETT PRETTYMAN
General Counsel
Bureau of Internal Revenue,
Attorney for Respondent. [20]

"EX. A"

AGREEMENT OF SALE AND PURCHASE BETWEEN INNES KINNEY AND CARLETON KINNEY.

This Agreement, made and executed in triplicate original as of the first day of July, 1930, by and between Innes Kinney as first party, and Carleton Kinney as second party.

WITNESSETH:

The first party hereby agrees to sell and dispose of his one-sixth (1/6) beneficial interest in, to and under that certain declaration of trust dated October

28, 1918, executed by Abbot Kinney, now deceased, and in and to the shares of stock of Abbot Kinney Company, and in and to all other property constituting a part of the trust estate under said trust, together with any qualifying shares of stock which may stand in his name on the books of the Abbot Kinney Company, a corporation, to the second party and the Abbot Kinney Company, a corporation in proportions and for the consideration herein set forth, and the second party hereby agrees that he and said Abbot Kinney Company will purchase the same in the proportions and for the consideration hereinafter set forth and upon the following terms and conditions:

1. The total purchase price for said one-sixth beneficial interest in said trust and any shares [21] of stock standing in the name of the first party on the books of said Abbot Kinney Company, is the sum of One Hundred Thirty Three Thousand Dollars ($133,000.00), payable as follows:

Forty-two Thousand Two Hundred Seventeen Dollars ($42,217.00) by cash, credit and in property as in this instrument set forth, and the balance of Ninety Thousand Seven Hundred Eighty-three Dollars ($90,783.00), together with interest thereon from July 1, 1930, at five per cent per annum on all portions of said sum of Ninety Thousand Seven Hundred Eighty-three Dollars ($90,783.00) remaining from time to time unpaid, to be paid by second party in monthly installments of Six Hundred Dollars ($600.00) per month, including interest (all

payments of such installments to be credited first to unpaid, accrued and earned interest, and the balance to be credited to principal).

2. Twenty-nine Thousand Two Hundred Seventeen Dollars ($29,217.00) of said Forty-two Thousand Two Hundred Seventeen Dollars ($42,217.00) is to be paid by cancellation of the indebtedness of first party to Abbot Kinney Company now amounting to Twenty-nine Thousand Two Hundred Seventeen Dollars ($29,217.00) in return for the transfer and assignment by first party to Abbot Kinney Company of such part of first party's said beneficial interest in said trust and in the said stock of Abbot Kinney Company as Twenty-nine Thousand Two Hundred Seventeen Dollars ($29,217.00) bears to One Hundred Thirty-three Thousand [22] dollars ($133,000.00), to-wit: $\frac{29217}{133000}$ part thereof. Such transfer and assignment is to be executed contemporaneously with the execution of this agreement and the first party by his signature to this agreement acknowledges receipt of the written cancellation and satisfaction of said indebtedness duly executed by said Abbot Kinney Company in full payment for such transfer and assignment.

3. One Thousand Dollars ($1,000.00) of said Forty-two Thousand Two Hundred Seventeen Dollars ($42,217.00) is to be paid by cancellation by Sherwood Kinney of the sum of $1,000.00 which first party agreed to pay Sherwood Kinney for assuming first party's portion of the mortgage indebtedness upon what the parties hereto know as the 16

Park Avenue property in Venice, California. Contemporaneously with the execution of this agreement first party agrees to transfer and assign to Sherwood Kinney $\frac{1}{133}$ part of said beneficial interest of first party in said trust and in the said stock of said Abbot Kinney Company.

4. The balance of said sum of Forty-two Thousand Two Hundred Seventeen Dollars ($42,217.00) to-wit: Twelve Thousand Dollars ($12,000.00) is to be paid by said second party to first party as follows: Thirty-eight Hundred Thirty Dollars ($3830.00) cash; four (4) so-called Abbot Kinney Company bonds of the par value of $1,000 each due June 1, 1931, together with accrued interest on said bonds from June 1, 1930 to [23] June 1, 1931 at 7% per annum, which said bonds have the agreed value of Four Thousand One Hundred Seventy Dollars ($4170.00), and an unsecured promissory note in the principal sum of Four Thousand Dollars ($4,000.00) dated July, 1930, payable on or before two years from date with interest at 7% per annum payable semi annually, signed by the second party in favor of first party, the receipt of which cash, bonds and promissory note from the second party are hereby acknowledged by the first party.

In consideration thereof, first party agrees contemporaneously with the execution of this agreement, to transfer and assign to second party such portion of his beneficial interest in said trust and in the stock of Abbot Kinney Company as $12,000 bears to $133,000, to-wit: $\frac{12000}{133000}$ part thereof, and second

party by his signature to this instrument acknowledged receipt of such transfer and assignment.

5. The balance of the purchase price, to-wit, Ninety Thousand Seven Hundred Eighty Three Dollars ($90,783.00), together with interest thereon from July 1, 1930, at 5% per annum on all portions of said $90,783.00 remaining from time to time unpaid, is payable and second party agrees to pay same, in monthly installments of $600.00 per month including interest, as follows: The first installment of $600.00 is paid herewith, the receipt of which is hereby acknowledged, and subsequent installments are payable on the first day of each and every subsequent month commencing September 1, 1930, subject to the conditions and limitations hereinafter set forth. All payments are to be credited, first to unpaid [24] accrued and earned interest and the remainder thereof to principal. It is expressly understood and agreed that if, while second party is an officer or director of Abbot Kinney Company and holds not less than the amount of stock in the Abbot Kinney Company which he now owns directly or indirectly, Abbot Kinney Company suspends or reduces the monthly payments now being made to second party for family and/or personal expenses so that the total amount received by second party from Abbot Kinney Company and/or its subsidiaries, from all sources, including dividends (now aggregating $500.00 per month) is reduced below $500.00 per month, then during the period that the aggregate of said items is below $500.00 per month the said monthly payments of $600.00 are also to be reduced in the same proportion; provided however, that if

and while said monthly payments to said second party aggregate less than $300.00 per month, all monthly payments can be suspended by second party at the option of the second party. In the event that the total payments hereunder to first pary for a period of sixty (60) days are less than Three Hundred Thirty Dollars ($330.00) per month, then either party hereto may terminate this contract by giving a similar thirty (30) day notice to that provided for in paragraph 9 hereof, and with like effect. Anything herein to the contrary notwithstanding no suspension or reduction can be made by second party in the $600.00 monthly installment in this agreement provided for, up to and including January 1, 1931. The privileges in [25] this agreement granted to second party to suspend or reduce the monthly payments of $600.00 per month are not to apply to any successor or successors in interest of the second party who are not members of the family of the parties hereto.

6. Contemporaneously with the execution of this agreement, first party agrees to assign and transfer unto Asa V. Call of Los Angeles, California, as trustee $\frac{90783}{133000}$ portion of his beneficial interest in said trust and in the said stock of Abbot Kinney Company (being the proportion of his interest therein that the sum of $90,783.00 bears to $133,000.00) to be held by said Asa V. Call upon the following uses and trusts:

(a) To manage the same for the mutual protection of the interests of first party and of second

party under this agreement, and with full and irrevocable power and authority to make assignments, transfers and deliveries of such portion of the beneficial interest of first party in said trust and in the said stock of Abbot Kinney Company as second party may become entitled to from time to time under the terms of this agreement;

(b) To collect and receipt for all dividends and the rents, issues and profits of said beneficial interest or such portion thereof as remains in the hands of said trustee from time to time, and to disburse and apply the same as herein provided. Upon the termination of the trust under said declaration of trust dated October 28, 1918, [26] executed by Abbot Kinney, to receipt for such portion of the trust estate held under said trust as first party may be entitled to thereunder at said time, which he shall hold under the trusts and for the uses and purposes specified herein;

(c) To execute such consents, receipts and any and all other instruments as may in the opinion of said trustee become necessary; to vote and/or instruct the trustees under said trust dated October 28, 1918, executed by Abbot Kinney in the manner that second party may request the said Asa V. Call as trustee to do, but not inconsistent with the provisions of this agreement;

(d) Upon the termination of this trust, to transfer and assign to second party such portion of the trust estate held by said Asa V. Call as trustee as second party may then be entitled to under the pro-

visions of this agreement, and to transfer the remainder unto first party; to exercise any and all other powers which the said Asa V. Call, as trustee, shall deem necessary for the protection of the rights and interests of first party and of second party not inconsistent with the provisions of this agreement and/or any modifications or changes hereof.

(e) Said Asa V. Call, as such trustee, shall not be entitled to compensation for his services as such trustee, but shall be entitled to any costs and expenses incurred by him in administering said trust, including any attorney's fees payable to such attorneys as may be employed by such trustee, which shall be a first lien and charge upon the trust estate in the hands of said trustee and to be paid from time to time with moneys available in said trust. [27]

(f) The Trustee may resign at any time by written notice to both first party and second party. The trustee may be removed only by the joint action of first party and second party executed in writing and delivered to said trustee. Upon the resignation of said trustee or the death of said trustee, or the removal of said trustee, Security-First National Bank of Los Angeles, or such other trustee as may be agreed upon by first party and second party shall be appointed in writing by the joint action of the first party and second party. Such new trustee shall be vested with all the powers and duties and with the property rights herein granted to said Asa V. Call, as trustee, and in addition thereto shall be

entitled to reasonable compensation to be paid by the first party. Said Asa V. Call as trustee, and any successor trustee, shall turn over all portions of the trust estate then remaining in his hands or constituting a part of the trust estate to such new trustee, whereupon, and not before, he shall be released and discharged as trustee hereunder. The provisions hereof shall apply to each successor trustee.

7. At the end of each six months' period, to-wit, on January 1st and July 1st of each year during the life of this agreement, it is expressly understood and agreed that second party shall be entitled to receive and have transferred and assigned to him by the trustee referred to in the preceding paragraph such portion of the present beneficial interest of first party in the trust created by Abbot Kinney as the aggregate of the payments upon prin- [28] cipal resulting from the monthly installments paid on said date and during the preceding six months bears to the sum of $133,000.00, and the trustee named in the preceding paragraph is hereby irrevocably authorized and instructed to execute such transfers and assignments from time to time as second party becomes entitled thereto under the provisions of this agreement.

8. Second party shall be entitled to receive any and all dividends upon, and the rents, issues and profits of, the beneficial interest of first party in said trust and in said stock of Abbot Kinney Company as may be assigned to said trustee as hereinafter provided which may be declared or accrue sub-

sequent to July 1, 1930, during the life of this agreement.

9. In the event that second party shall fail to pay any installment which he is obligated to pay under the terms and conditions hereof, and such failure shall continue for a period of thirty days, first party may, at the option of first party, thirty days after written notice of said default to second party and to the trustee named in paragraph 6 hereof, or any successor of said trustee, said notice to be by mail to the address of second party on file at the office of the trustee and to the trustee at his office, (unless said default has been made good) cancel this agreement as to unpaid for stock or beneficial interest, in which event second party shall be entitled [29] to receive such portion of said beneficial interest of first party in said trust and in the stock of Abbot Kinney Company as the total of the principal of the purchase price then paid by second party hereunder bears to the sum of $133,000.00 (excluding, of course, such portion thereof as second party may already have received) and second party shall forfeit all interest in the remainder of said beneficial interest, and this contract and trust created hereunder shall thereupon cease and determine.

10. In the event of the death of second party during the life of this agreement the executor and/or administrator of his estate may, within the period of six months after the date of death of sec-

ond party, terminate this agreement by securing, within said six months' period, an order of the court having jurisdiction over the probate proceedings of the estate of second party authorizing such action and serving notice of such termination upon first party, in which event the estate of second party shall be entitled to receive such portion of the said beneficial interest of first party in said trust and in the stock of Abbot Kinney Company as the total of the principal of the purchase price paid by second party hereunder bears to the sum of $133,000.00 (excluding, of course, such portion of the beneficial interest of first party in said estate and in the stock of Abbot Kinney Company as heretofore has been assigned and transferred by first party to second party. [30]

11. First party agrees to deliver to second party contemporaneously with the execution of this agreement his written resignation as a director and officer of Abbot Kinney Company and of all its subsidiary companies, including Venice Hotel Corporation, in which first party may be a director and/or an officer, together with his written resignation as a trustee under the said trust created by Abbot Kinney under date of October 28, 1918, hereinbefore referred to, and as trustee under any other trusts in which the parties hereto may be interested, which second party is hereby irrevocably authorized to present and have immediately accepted. First party also agrees to deliver to second party contempor-

aneously with the execution of this agreement a written release, cancellation and discharge of any and all other agreements between first and second parties, or in which first and second parties are parties, executed prior to July 1, 1930.

12. Subject to the limitations and conditions herein contained, this agreement shall be binding upon the heirs, executors, administrators and assigns of the respective parties hereto.

13. Notwithstanding anything hereinbefore provided in paragraph 8 hereof to the contrary, it is agreed that should said Abbot Kinney Company hereafter sell any of its capital assets, either real or personal [31] and thereafter declare a dividend or dividends, liquidating or otherwise, of the proceeds of such sale or sales, that in the event the payment of such dividend or dividends would reduce the book value of the issued capital stock of Abbot Kinney Company below the sum of $10.00 per share, then the amount of such dividend so reducing said book value as is declared upon shares of stock in the hands of the trustee, or represented by a distribution on the beneficial interest in the aforesaid trust of said Abbot Kinney, deceased, in the hands of the trustee, shall be paid to the party of the first part to apply upon the unpaid balance of the purchase price due said party of the first part hereunder, interest first and principal second. It is understood, however, that such payments as are provided in this paragraph shall not affect the obliga-

tion of the party of the second part to continue the making of monthly payments to the party of the first part as in this contract provided.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first hereinabove written.

INNES KINNEY,
First Party.
CARLETON KINNEY,
Second Party.

I hereby accept the trust provided for in paragraph 6 hereof this 25 day of August, 1930.

ASA V. CALL.

EX. B.

AGREEMENT OF SALE AND PURCHASE BETWEEN THORNTON KINNEY AND SHERWOOD KINNEY.

This agreement, made and executed in triplicate original this 5th day of August, 1930, by and between Thornton Kinney as first party and Sherwood Kinney as second party,

Witnesseth:

First party hereby agrees to sell and dispose of his one-sixth beneficial interest in, to and under that certain declaration of trust dated October 28, 1918, executed by Abbot Kinney, now deceased, and in and to the shares of stock of the Abbot Kinney Company, and in and to all other property consti-

tuting a part of the trust estate under said trust, together with any and all shares of the capital stock of Abbot Kinney Company standing of record in the name of first party or owned by first party, to second party, Abbot Kinney Company, Clan Kinney and Helen Kinney Gerety, in the proportions and for the considerations hereinafter set forth, and second party hereby agrees that he and said Abbot Kinney Company, Clan Kinney and Helen Kinney Gerety, will purchase the same in the proportions and for the considerations hereinafter set forth, and upon the following terms and conditions:

O.K. T. K.
S. K.

1. The total purchase price for said one-sixth beneficial interest is the sum of One Hundred thirty-three thousand dollars ($133,000.00), payable Fifty-one thousand dollars ($51,000.00) by cash and credit as in this instrument set forth, and the balance of Eighty-two thousand [33] dollars ($82,000.00), together with interest thereon from July 1, 1930, at five per cent. (5%) per annum on all portions of said $82,000.00 remaining from time to time unpaid, to be paid by second party in monthly installments at $600.00 per month including interest (all payments of such installments to be credited first to unpaid accrued and earned interest and the balance to be credited to principal).

2. $19,388.86 of said $51,000.00 is to be paid by cancellation of the indebtedness of first party to Abbot Kinney Company now amounting to $19,-

388.86 in return for the transfer and assignment by first party to Abbot Kinney Company of such part of first party's said beneficial interest in said trust and in the said stock of Abbot Kinney Company as $19,388.86 bears to $133,000.00, to wit, $\frac{1,938,886}{13,300,000}$ part thereof. Such transfer and assignment is to be executed contemporaneously with the execution of this agreement and the first party by his signature to this agreement acknowledges receipt of the written cancellation and satisfction of said indebtedness duly executed by said Abbot Kinney Company in full payment for such transfer and assignment.

O.K. T. K.
S. K.

3. $19,100.00 of said $51,000.00 is to be paid by cancellation of the indebtedness of first party to Clan Kinney and Helen Kinney Gerety now amounting to $19,100.00 in return for the transfer and assignment by first party to Clan Kinney and Helen Kinney Gerety of such part of first party's said beneficial interest in said trust and in the said stock of Abbot Kinney Company as $19,100.00 bears to $133,000.00, to wit, $\frac{191}{1,330}$ part thereof. Such transfer [34] and assignment is to be executed contemporaneously with the execution of this agreement and the first party by his signature to this agreement acknowledges receipt of the written cancellation and satisfaction of said indebtedness duly executed by said Clan Kinney and Helen Kinney

Gerety in full payment for such transfer and assignment.

4. $1,000.00 of said $51,000.00 is to be paid by cancellation by second party of the sum of $1,000.00 which first party agreed to pay second party for assuming first party's portion of the mortgage indebtedness upon what the parties hereto know as the 16 Park Avenue Property in Venice, California. Second party by his signature to this agreement assumes and agrees to pay first party's portion of said mortgage indebtedness. Contemporaneously with the execution of this agreement first party agrees to transfer and assign to second party $\frac{1}{133}$ part of said beneficial interest of first party in said trust and in the said stock of said Abbot Kinney Company, and second party hereby acknowledges receipt of such transfer and assignment. Second party, by his signature to this instrument, cancels, and acknowledges full satisfaction of, his claim against first party for said $1,000.00 in this paragraph referred to.

O.K. T. K.
S. K.

5. The balance of said $51,000.00, to wit, $11,511.14, has been, or is to be, paid by second party to first party as follows: $500.00 on July 1, 1930, and $11,011.14 contemporaneously with the execution of this agreement, the receipt of which is hereby acknowledged by first party. In considera- [35] tion of said payment of $11,511.14 to first party by second party, first party agrees, contemporaneously

with the execution of this agreement, to transfer and assign to second party such portion of his said beneficial interest in said trust and in the stock of Abbot Kinney Company as $11,511.14 bears to $133,000.00, to wit, $\frac{1,151,114}{13,300,000}$ part thereof, and second party by his signature to this instrument acknowledges receipt of such transfer and assignment.

6. The balance of the purchase price, to wit, $82,000.00, together with interest thereon from July 1, 1930 at 5% per annum on all portions of said $82,000.00 remaining from time to time unpaid, is payable, and second party agrees to pay same, in monthly installments of $600.00 per month including interest, as follows: The first installment of $600.00 was paid on July 1, 1930, and receipt thereof is hereby acknowledged, and subsequent installments are payable on the first day of each and every subsequent month subject to the conditions and limitations hereinafter set forth. All payments are to be credited first to unpaid accrued and earned interest and the remainder thereof to principal. It is expressly understood and agreed that if, while second party is an officer or director of Abbot Kinney Company and holds not less than the amount of stock in the Abbot Kinney Company which he now owns

O.K. T. K.
S. K.

directly or indirectly, Abbot Kinney Company suspends or reduces the monthly payments now being made to second party so that the total amount re-

ceived by second party from Abbot Kinney Company and/or its subsidiaries, from all sources (now aggregating $925.00 per month) is reduced below $925.00 per month, then during the period that the aggregate [36] of said items is below $925.00 per month the said monthly payments of $600.00 are also to be reduced in the same proportion; provided, however, that if and while said monthly payments to second party aggregate less than $500.00 per month, all monthly payments can be suspended by party at the option of second party. In such event and should such suspension continue for sixty (60) days and second party not make payments of at least $330.00 per month to first party, then either party hereto may terminate this contract by giving a similar thirty-day notice to that provided in paragraph 10 hereof, and with like effect. Anything herein to the contrary notwithstanding, no suspension or reduction can be made by second party in the $600.00 monthly installments in this agreement provided for prior to January 1, 1931, and notwithstanding anything herein contained to the contrary, if and while the monthly salary of Jack Gerety from the Abbot Kinney Company and/or its subsidiaries is above the sum of $325.00 per month in the aggregate or the salary of Edward Gerety, Jr., from Abbott Kinney Company or its subsidiaries is above the sum of $350.00 per month in the aggregate, the monthly installments of $600.00 hereinabove provided for cannot be suspended or reduced.

O.K. T. K.
S. K.

7. Contemporaneously with the execution of this agreement, first party agrees to assign and transfer unto Asa V. Call, of Los Angeles, California, as trustee, $\frac{82}{133}$ portion of his beneficial interest in said trust and in the said stock of Abbot Kinney Company (being the proportion of his interest therein that the sum of $82,000.00 bears to $133,000.00, together with any and all shares of the capital stock of Abbot Kinney Company standing in the name of first party or owned by first party, to be held by said Asa V. Call upon the following uses and trusts: To manage the same for the mutual protection [37] of the interests of first party and of second party under this agreement, and with full and irrevocable power and authority to make assignments, transfers and deliveries of such portion of the beneficial interest of first party in said trust and in the said stock of Abbot Kinney Company as second party may become entitled to from time to time under the terms of this agreement; to collect and receipt for all dividends and the rents, issues and profits of said beneficial interest or such portion thereof as remains in the hands of said trustee from time to time, and to disburse and apply the same as herein provided. Upon the termination of the trust under said declaration of trust dated October 28, 1918, executed by Abbot Kinney, to receipt for such portion of the trust estate held under said trust as first party may be entitled to thereunder at said

time, which he shall hold under the trusts and for the uses and purposes specified herein; to execute such consents, receipts and any and all other instruments as may in the opinion of said trustee become necessary; to vote and/or instruct the trustees under said trust dated October 28, 1918, executed by Abbot Kinney in the manner that second party may request the said Asa V. Call as trustee to do, but not inconsistent with the provisions of this agreement;

O.K. T.K. S.K.

upon the termination of this trust, to transfer and

O.K. T. K.
S. K.

assign to second party such portion of the trust estate held by said Asa V. Call as trustee as second party may then be entitled to under the provisions of this agreement, and to transfer the remainder unto first party; to exercise any and all other powers which the said Asa V. Call as trustee shall deem necessary for the protection of [38] the rights and interests of first party and of second party not inconsistent with the provisions of this agreement and/or any modifications or changes hereof. Said trustee shall be entitled to any costs and expenses of said trustee in administering said trust, which shall be a first lien and charge upon the trust estate in the hands of said trustee and to be paid from time to time with moneys available in said trust. The trustee may resign at any time by written notice to both first party and second party. The trustee may be removed only by the joint action of

first party and second party executed in writing and delivered to said trustee. Upon the resignation of said trustee or the death of said trustee or the removal of said trustee, a new trustee may be appointed in writing by the joint action of first party and second party executed in writing; provided, however, that if the parties hereto are unable to agree upon such new trustee within a period of ten days, such new trustee shall be designated by the person who is then presiding judge of the superior court of Los Angeles County, California, upon the application of any interested party. Such new trustee shall be vested with all the powers and duties and with the property rights herein granted to said Asa V. Call as trustee. Said Asa V. Call as trustee, O.K. T. K.
S. K.
and any successor trustee, shall turn over all portions of the trust estate then remaining in his hands or constituting a part of the trust estate to such new trustee, whereupon, and not before, he shall be released and discharged as trustee hereunder. The provision hereof shall apply to each successor trustee. [39]

8. At the end of each six months' period, to wit, on January 1st and July 1st of each year during the life of this agreement, it is expressly understood and agreed that second party shall be entitled to receive and have transferred and assigned to him by the trustee referred to in the preceding paragraph such portion of the present beneficial interest

of first party in the trust created by Abbot Kinney as the aggregate of the payments upon principal resulting from the monthly installments paid on said date and during the preceding six months bears to the sum of $133,000.00, together with such portion of the stock of Abbot Kinney Company not constituting a part of the trust estate as now stands in the name of or is owned by first party as the aggregate of such payments upon principal bears to the sum of $82,000.00, and the trustee named in the preceding paragraph is hereby irrevocably authorized and instructed to execute such transfers and assignments from time to time as second party becomes entitled thereto under the provisions of this agreement.

9. Second party shall be entitled to receive any and all dividends upon and the rents, issues and profits of, the beneficial interest of first party in said trust and in said stock of Abbot Kinney Company as may be assigned to said trustee as hereinafter provided which may be declared or accrue subsequent to July 1, 1930, during the life of this agreement.

O.K. T. K.
S. K.

10. In the event that second party shall fail to pay any installment which he is obligated to pay under the terms and conditions hereof and such failure shall continue for a period of thirty days after written notice from first party to second party, first party may, at the option of first party, by written notice to second party and to the trustee named in paragraph 7 hereof, cancel this agreement

as to unpaid-for stock or beneficial interest, in which event second [40] party shall be entitled to

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S.K.

receive such portion of the said beneficial interest of first party in said trust and in the stock of Abbot Kinney Company as the total of the principal of the purchase price then paid by second party hereunder bears to the sum of $133,000.00 (excluding, of course, such portion thereof as second party may already have received), and second party shall forfeit all interest in the remainder of said beneficial interest and this contract shall thereupon cease and determine.

11. In the event of the death of second party during the life of this agreement the executor and/or administrator of his estate may, within the period of three months after the date of death of second party, terminate this agreement by securing, within said three months' period, an order of the court having jurisdiction over the probate proceedings of the estate of second party authorizing such action and serving notice of such termination upon first party, in which event the estate of second party shall be entitled to receive such portion of the said beneficial interest of first party in said trust and in the stock of Abbot Kinney Company as the total of the principal of the purchase price paid by second party hereunder bears to the sum of $133,000.00

O.K. T. K.
S. K.

(excluding, of course, such portion of the beneficial

interest of first party in said estate and in the stock of Abbot Kinney Company as theretofore has been assigned and transferred by first party to second party.

12. First party agrees to deliver to second party contemporaneously with the execution of this agreement his [41] written resignation as a director and officer of Abbot Kinney Company and of all its subsidiary companies, including Venice Hotel Corporation, in which first party may be a director and/or an officer, together with his written resignation as a trustee under the said trust created by Abbot Kinney under date of October 28, 1918, hereinbefore referred to, and as trustee under any other trusts in which the parties hereto may be interested, which second party is hereby irrevocably authorized to present and have immediately accepted. First party also agrees to deliver to second party contemporaneously with the execution of this agreement a written release, cancellation and discharge of any and all other agreements between first and second parties or in which first and second parties are parties executed prior to July 1, 1930. Nothing in this paragraph contained is intended to affect the interests of the parties hereto in Western Feeding Company.

13. Subject to the limitations and conditions herein contained, this agreement shall be binding upon the heirs, executors, administrators and assigns of the respective parties hereto.

In witness whereof, the parties hereto have executed this agreement in triplicate original as of the

day, month and year herein first above written, each party hereto retaining one original and the third original being deposited with Mr. Asa V. Call as trustee.

THORNTON KINNEY,
SHERWOOD KINNEY.

I hereby accept the trusts provided for in para-
[42] graph 7 hereof, this 5th day of August, 1930.

ASA V. CALL.

For a valuable consideration, receipt of which is hereby acknowledged, I hereby sell, assign and transfer to and deposit with the BANK OF AMERICA National Trust and Savings Association, all of my right, title and interest in and to the foregoing and within contract, declaration of Trust, and the property therein described.

Dated November 30th, 1930.

THORNTON KINNEY.

[Endorsed]: United States Board of Tax Appeals. Sep 18, 1930. [43]

United States Board of Tax Appeals

Estate of Winifred H. Kinney, Petitioner, v. Commissioner of Internal Revenue, Respondent
Docket No. 49582. Promulgated May 1, 1934.

A testator directed that certain securities should be held in trust for a period of 12 years after his death, with the income payable to his widow and children, in proportions named, during their respective lives. At the termination of the trust, the will provided that title to the whole of the property should immediately vest in the beneficiaries, in proportions indicated, by title absolute. Should all beneficiaries die before termination of the trust, its corpus was directed to be distributed among certain grandchildren of testator. Held, at testator's death the widow took an immediate vested remainder interest in the corpus of the trust, which interest was properly invoiced as an asset of her estate at her death, which occurred before termination of the trust. In Re Fair's Estate, 122 Cal. 523; 60 Pac. 442.

R. C. Gortner, for the petitioner.

T. M. Mather, Esq., for the respondent.

OPINION

Lansdon: The respondent has determined a deficiency in estate tax in the amount of $3,968.07.

Two questions are involved, viz., (1) Whether the decedent at date of death had a vested interest in one-ninth of the corpus of a certain trust, and (2) the value of such interest at that date. The parties have filed a stipulation which the Board accepts. The material facts so agreed to may be summarized as follows:

Winifred H. Kinney, the decedent, died testate on December 6, 1927. This appeal is prosecuted by Sherwood Kinney and R. C. Gortner, as executors, both living in Los Angeles, California.

On October 28, 1918, Abbot Kinney, husband of the decedent, executed a trust indenture which included the following:

That Abbot Kinney of Los Angeles County, California, herein designated the trustee, does hereby covenant and declare that he has and holds the title to the following described property in trust for the uses and purposes hereinafter expressed, to-wit:

All shares of stock owned by and all shares outstanding in the name of Abbot Kinney on the books of the company in the Abbot Kinney Company, a corporation, organized under the laws of California, and which said title and [44] ownership of shares includes all shares heretofore issued by said company, except three (3) shares.

That said trustee shall have the power to sell, transfer, convey and mortgage all or any of said property, and to receive the rents and profits from said property, and as incidental thereto to manage said property and vote all shares of stock, and to

pay and apply said rents and profits for the support and maintenance of the following named persons, in the proportions hereinafter stated, to-wit:

To Thornton Kinney one-sixth (1/6); to Sherwood Kinney one-sixth (1/6); to Innes Kinney one-sixth (1/6); to Carleton Kinney one-sixth (1/6); to Winifred H. Kinney for the support and maintenance of herself, and for the support and maintenance of the two minor children of Abbott Kinney, to-wit: Helen Kinney and Clan Kinney, to be controlled and applied by said *Wilfred* H. Kinney, one-third (1/3); provided, however, that during the life of Abbot Kinney, trustee above named, he shall act as the sole trustee under this declaration of trust, and he being the sole trustor and maker of this trust shall have the power to revoke this trust at any time during his lifetime, and during his life time he reserves and shall have the right to receive and to apply one-half of all the rents, income and profits from the property above described for his sole use as he may determine. In case of the death, absence or inability to act, of said Abbot Kinney, trustee, such vacancy shall be filled by a board of directors composed of the following named persons, by proper transfers and declarations of trust; Thornton Kinney; Winifred H. Kinney; Sherwood Kinney, Innes Kinney and Carleton Kinney, and in case of death, absence or inability to act of either or any of said five, then such vacancy shall be filled by Clan Kinney and Helen Kinney, in the order named, and all such trustees, in turn, shall have and be pos-

sessed of all the power under this trust hereinbefore mentioned.

* * * * * * *

Upon the termination of this trust, unless revoked, the title to the whole of said property, so held in trust, shall immediately vest in the above named beneficiaries by title absolute, in the same proportions above named for rents and profits and the said one-third (1/3) above set forth for the support of Winifred H. Kinney, Helen Kinney and Clan Kinney, will pass to them in equal shares by absolute title.

* * * * * * *

Winifred H. Kinney, wife of said Abbot Kinney, hereby joins in this instrument, and hereby declares that all of said property transferred in trust as aforesaid is the separate property and estate of said Abbot Kinney, subject to his disposition and control, and hereby renounces all claims to said property as community property or otherwise, and sets the same apart as the sole property and estate of said Abbot Kinney.

Abbot Kinney died in November, 1920. The decedent bequeathed her interest in the trust to her two children, Clan Kinney and Helen Kinney Gerety. The other beneficiaries of the trust were children of the trustor by a previous marriage.

The net worth of the Abbot Kinney Co. on December 6, 1927, as reflected by the book values of its assets, was $1,814,103.93, and on June 30, 1920, was $1,438,016.60. On July 1, 1930, Innes Kinney sold

a one-sixth beneficial interest in the trust to Carleton Kinney for [45] $133,000. On August 5, 1930, Thornton Kinney sold a one-sixth beneficial interest in the trust to Sherwood Kinney for $133,000.

It is stipulated that if called as witnesses, C. C. Hogan, trust officer, Security First National Bank of Los Angeles, would testify that in his opinion Mrs. Kinney could not have sold her interest in the trust for more than 50 per cent of the pro rata value of the capital stock of the corporation in 1927; that W. D. Newcomb, Jr., president of the First National Bank of Venice, California, would testify that the fair market value of Mrs. Kinney's interest in the trust in 1927 was not in excess of 25 per cent of the fractional worth of the corporation; and that Herbert Hertel, manager of the Venice Branch of the Security First National Bank of Los Angeles, would testify that in his opinion Mrs. Kinney's beneficial interest was worth 33-1/3 per cent of the fractional net worth of the corporation's assets in 1927.

On the question whether or not the decedent at the time of her death owned a vested interest in the corpus of the trust, we must sustain the contentions of the respondent.

Construing the trust instrument from its four corners, it is clear that it created an executed trust which gave to the beneficiaries not only the income from the trust estate during its life, but a vested

interest as remaindermen in the corpus, which became absolute at its termination. In Re Fair's Estate, 122 Cal. 523; 60 Pac. 442; Nobel v. Leonard, 153 Cal. 245; 94 Pac. 1047; Nichol v. Emery, 109 Cal. 323; 41 Pac. 1089.

The petitioner argues that because the language of the trust instrument provides that upon termination of the trust the title to the whole of the property "shall immediately vest" in the beneficiaries by title absolute, no title could vest in the beneficiaries until such time. It is obvious that in taking this position the petitioner has confused the decedent's title to a vested remainder in the corpus of the trust with that of title absolute in the whole property after exhaustion of the trust. The remaindermen and the "particular estate" (trust estate here) are separate species of property, complement, however, to each other and created at the same time and by the same instrument. The title to both passed out of the owner at the time he created the trust; one going to the trustees, and the other to the remaindermen, they being in esse at the time. 23 R. C. D. 492; Doe v. Considine, 6 Wall. 458; Anderson v. Messinger, 146 Fed. 929; Bunting v. Speck, 21 Pac. 288.

The corpus of the trust here considered consisted of the capital stock of the Abbot Kinney Co., and in determining the value of the decedent's interest in it at the time of her death respondent took as his base the agreed net worth of that company's assets on that date and divided it by nine. The

petitioner contends that in no event [46] could the value of that interest have been equal to a one-ninth part of such net worth, because of the fact that possession and control were in the trustees, and seeks to establish the fair market value of such interest at the date of decedent's death by showing sales made by two cobeneficiaries of their respective interests in the trust on or about June 30, 1930.

The alleged sales of interests, so referred to, being more than two years and six months after decedent's death (December 6, 1927), are too remote in point of time to serve as a guide in determining values on the basic date. A review of the sale agreements also shows that they were not cash sales, but mere contracts in which credits and washing out of accumulated advances formed the major part of the considerations involved. They, therefore, furnish us no useful guide in this inquiry and will be disregarded.

The parties have agreed what certain bank officials, if present, would testify respecting their individual opinion of decedent's interest, expressed in percentages of and comparisons to the corporation's assets. One opinion, so put into the record, suggests that decedent's interest could not have been sold for more than 50 per cent of the pro rata of one ninth of the corporation's capital stock in 1927. Another is that the value of that interest was not in excess of 25 per cent of the corporation's net worth; and the other that the interest was worth 33-1/3

per cent of the net worth of the corporation's interest in 1927.

It is obvious that these vague opinions in no sense constitute proof, and, even as arguments, they assign no reasons for the positions assumed. The first two are negative in character and attempt to say what price the decedent's interest could not have been sold for on the basic date, and the other what that interest's relative value was compared to the corporation's net assets. These opinions, like the alleged sales hereinbefore mentioned, are not evidence, and we merely refer to them in this opinion to indicate the extent to which the petitioner has failed in giving us any proof to show that the respondent erred in his determination of the value of a one ninth interest in the trust in the amount of $201,567.10. Warren M. Horner, 5 B. T. A. 974; Wm. A. Pringle et al., Executors, 6 B. T. A. 299; English & Scottish Law Life Assurance Assn., 10 B. T. A. 454; G. S. Patterson, 17 B. T. A. 716.

Decison will be entered for the respondent.

[Seal] Board of Tax Appeals. [47]

United States Board of Tax Appeals
Washington

Docket No. 49582

ESTATE OF WINIFRED H. KINNEY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its report promulgated May 1, 1934, it is

Ordered and Decided: That there is a deficiency in estate tax in the amount of $3,968.07.

[Seal] (Signed) W. G. LANSDON,
Member. [48]

[Endorsed]: Entered May 5, 1934.

[Title of Court and Cause.]

PETITION FOR REVIEW.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Sherwood Kinney as Executor of, and Helen Kinney Gerety as Administratrix with the Will Annexed of, the Estate of Winifred H. Kinney, deceased, present their petition on behalf of the Estate of Winifred H. Kinney, deceased, and file the same in pursuance of the provisions of Section 1001 of the Act of Congress approved February 26, 1926, entitled, "The Revenue Act of 1926", and the acts

amendatory thereof and supplemental thereto, for the review of the decision of the United States Board of Tax Appeals promulgated on May 1st, 1934 and entered on May 5th, 1934, approving a deficiency in estate tax of the Estate of Winifred H. Kinney, deceased, [49] in the amount of thirty-nine hundred and sixty-eight and 7/100ths dollars ($3968.07), and respectfully show to this Honorable Court as follows:

I.

The nature of the controversy is as follows:

The controversy arises out of the construction of a certain Trust Indenture executed by Abbot Kinney, husband of the decedent, in 1918, and also the method used in fixing the value of decedent's interest thereunder.

In the document referred to, the said Abbot Kinney designated himself as trustee, and declared that he held title as trustee for certain purposes therein set forth, to all of the shares of stock of Abbot Kinney Company, a corporation, standing in his name. He retained power to revoke said trust during his lifetime. As such trustee he had power to sell and convey, receive the rents and profits, vote the shares of stock, and "to pay and apply said rents and profits for the support and maintenance of" his wife, Winifred H. Kinney, and certain children of the deceased, named in said document.

No other person was a party to the Declaration of Trust except Abbot Kinney and his wife Winifred H. Kinney, who joined in the same and de-

clared the property of the trust was his separate property.

The trust provided that it should last for a [50] period of twelve years after the death of Abbot Kinney, and that, upon its termination, the title to the whole property should immediately vest in the named beneficiaries by title absolute, in the same proportions as they were to receive the rents and profits.

The trust was never revoked during Abbot Kinney's lifetime.

The trust contained no express provision for distribution of the property except as hereinabove stated.

Abbot Kinney died in November, 1920; Winifred H. Kinney died December 6th, 1927; consequently, the twelve year period expired after the death of Winifred H. Kinney.

The Commissioner held that, at Abbot Kinney's death, the widow took an immediate vested remainder in the corpus, and the Commissioner fixed the value of the same on the basis of the book value of the stock of the corporation, without taking into consideration the fact that, at said date, the stock was still held in trust, and the Estate of Winifred H. Kinney had no right to vote the stock or exercise any control over it other than to accept the dividends.

The Executors, on behalf of the said Estate, contended that, under the peculiar wording of the trust agreement, no title vested until the termination of

the trust, and therefore that no title at all vested in the estate of Winifred H. Kinney which was taxable. [51] They also contended that if any title did vest which was taxable, the method of fixing the value of the stock used by the Commissioner was erroneous, and the amount of tax therefore excessive.

II.

DESIGNATION OF COURT OF REVIEW.

The petitioners are respectively Executor and Administratrix with Will Annexed of the said Estate of Winifred H. Kinney, deceased, and are both residents of Los Angeles County, California, of which County the said deceased died a resident.

The proceedings for the probate of the said estate are pending in the Superior Court of the State of California, in and for the said County of Los Angeles, and the petitioners, being aggrieved by the findings of fact, opinion, decision and order, seek a review thereof in accordance with the provisions of the Revenue Act of 1926 and Acts amendatory thereof and supplemental thereto by the United States Circuit Court of Appeals for the Ninth Circuit, within which Circuit is located the office of the Collector of Internal Revenue at Los Angeles, with whom petitioners made and filed their returns of Federal Estate taxes.

III.

ASSIGNMENTS OF ERRORS.

Petitioners, as a basis for review, make the following assignments of errors: [52]

First: That the said United States Board of Tax Appeals erred in deciding that, at the date of her death, the deceased, Winifred H. Kinney, had a vested interest in the corpus of a certain trust made by Abbot Kinney in his lifetime.

Second: The United States Board of Tax Appeals erred in deciding that the trust agreement created an executed trust which gave to the beneficiaries not only the income from the trust estate during its life, but a vested interest as remaindermen in the corpus which became absolute at its termination.

Third: That the United States Board of Tax Appeals erred in approving the fixing of the value of decedent's interest in the trust as the agreed net worth of the Abbot Kinney Company's assets on the date of death and dividing it by nine.

Fourth: That the United States Board of Tax Appeals erred in holding that the sale of interests in the trust two years and six months after the decedent's death was too remote in point of time to serve as a guide in determining values on the basic date.

Fifth: That the United States Board of Tax Appeals erred in disregarding said sale in the fixing of the value of decedent's alleged interest.

Sixth: That the United States Board of Tax Appeals erred in disregarding the testimony of certain [53] bank officials which was stipulated to, as to the value of decedent's interest in the trust estate.

Wherefore, your petitioners pray that this Honorable Court may review such findings, decree, opinion and order, and reverse and set aside the same, and that the Clerk of the United States Board of Tax Appeals be directed to transmit and deliver to the Clerk of this Court certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing Petition for Review, and as required by the rules of the said court and the statutes made and provided.

SHERWOOD KINNEY,
Executor of the Estate of Winifred H. Kinney, Deceased.
HELEN KINNEY GERETY,
Administratrix with Will Annexed of the Estate of Winifred H. Kinney, Deceased.

R. C. GORTNER,
Attorney for Petitioner
Sherwood Kinney, Executor.
HAROLD J. CASHIN,
Attorney for Petitioner
Helen Kinney Gerety,
Administratrix with the
Will Annexed. [54]

State of California,
County of Los Angeles.—ss.

R. C. GORTNER, being first duly sworn, deposes and says:

That he is the attorney for Sherwood Kinney, one of the petitioners herein, and, as such, is duly authorized to verify the petition for review by the United *States Court* of Appeals in the Ninth Circuit of the decision in the above entitled case.

That he has read the said petition and is familiar with the contents thereof, and that the facts therein stated are true except such facts as may be stated on information and belief, and those facts he believes to be true.

R. C. GORTNER

Subscribed and sworn to before me this 27 day of July, 1934.

[Seal] ROBERT MARCUM,
Notary Public in and for said County and State.

My Commission expires February 26, 1938.

[Endorsed]: United States Board of Tax Appeals. Filed Jul. 30, 1934. [55]

State of California,
County of Los Angeles—ss.

HAROLD J. CASHIN, being first duly sworn, deposes and says:

That he is the attorney for Helen Kinney Gerety, one of the petitioners herein, and, as such, is duly

authorized to verify the petition for review by the United *States Court* of Appeals of the Ninth Circuit of the decision in the above entitled case.

That he has read the said petition, and is familiar with the contents thereof, and that the facts therein stated are true except such facts as may be stated on information and belief, and those facts he believes to be true.

HAROLD J. CASHIN.

Subscribed and sworn to before me this 27th day of July, 1934.

[Seal] GLADYS GILKS,
Notary Public in and for said County and State.

My Commission expires Nov. 19, 1934.

[Endorsed]: United States Board of Tax Appeals. Filed Jul. 30, 1934. [56]

[Title of Court and Cause.]

NOTICE OF FILING OF PETITION FOR REVIEW.

To Robert H. Jackson, General Counsel Bureau of Internal Revenue, Washington, D. C., Attorney for Respondent Commissioner of Internal Revenue:

Please take notice that the undersigned did, on the ..... day of July, 1934, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a Petition for Review by the United States Circuit Court of Appeals for the Ninth Cir-

cuit, of the decision of the Board heretofore rendered in the above entitled case.

A copy of the Petition for Review and the Assignments of Errors as filed is hereto attached and served upon you. [57]

Dated: this ..... day of July, 1934.

R. C. GORTNER,
Attorney for Petitioner
Sherwood Kinney, Executor.
HAROLD J. CASHIN,
Attorney for Petitioner Helen
Kinney Gerety, Administratrix with the Will Annexed.

Copy of the above Notice and copy of the Petition for Review is hereby accepted this 20th day of Aug., 1934.

(Sgd) ROBERT H. JACKSON,
General Counsel Bureau
of Internal Revenue. [58]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States Board of Tax Appeals, Washington, D. C.

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to a petition for review filed in the above entitled court, and to include in such transcript of record the folfowing and no other papers and exhibits, to-wit:

1. Petition to the board filed July 16, 1930.
2. Amended petition filed September 5, 1930.

3. Answer of respondent filed October 28, 1930.

4. Stipulation of facts, with exhibits A and B attached, filed September 18, 1933.

5. Opinion of the board promulgated May 1, 1934, and decision finding a deficiency of $3968.07 entered May 5, 1934. [59]

6. Petition for Review filed July 30, 1934.

7. Notice of filing Petition for Review, together with proof of service of said note and petition.

8. The docket entries of all proceedings before the Board of Tax Appeals.

9. This praecipe and service thereon.

Said transcript to be prepared as required by law and the requirements of the Board of Tax Appeals and the requirements of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco.

Dated: August 31st, 1934.

(Sgd) R. C. GORTNER,
Attorney for Sherwood Kinney,
Executor of the Estate of
Winifred H. Kinney, Decd.

(Sgd) HAROLD J. CASHIN,
Attorney for Helen Kinney
Gerety, Administratrix with
Will Annexed of the Estate of
Winifred H. Kinney, Deceased.

Service of the above praecipe accepted and acknowledged this 4th day of September, 1934.

ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

[Endorsed]: United States Board of Tax Appeals. Filed Sept. 7, 1934. [60]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 60, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 27th day of September, 1934.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 7639. United States Circuit Court of Appeals for the Ninth Circuit. Estate of Winifred H. Kinney, Deceased, by Sherwood Kinney and R. C. Gortner, Executors, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed October 8, 1934.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 7639.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Estate of Winifred H. Kinney, Deceased, by Sherwood Kinney and R. C. Gortner, Executors,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONER.

R. C. GORTNER,
705 N. Maple Drive, Beverly Hills, Calif.,
Attorney for Sherwood Kinney, Executor of the Estate of Winifred H. Kinney, deceased.

HAROLD J. CASHIN,
404 Higgins Building, Los Angeles, Calif.,
Attorney for Helen Kinney Gerety, Administratrix with Will Annexed of the Estate of Winifred H. Kinney, deceased.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

Text Books and Encyclopedias.

No. 7639.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Estate of Winifred H. Kinney, Deceased, by Sherwood Kinney and R. C. Gortner, Executors,

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONER.

A.

THE QUESTION.

The question before the Court is, first, whether deceased's estate had any taxable interest in property held under a declaration of trust executed by her predeceased husband, which had not terminated at her death, and which trust specifically provided that the *corpus* would not vest until the termination of the trust. Second, if deceased's estate did have such a taxable interest, was the method adopted by the Commissioner for determining the value of that interest proper, that is, basing it on the book value of the shares so held in trust, although the trust would not terminate for a full five years after the death of deceased.

B.

STATEMENT OF THE EVIDENCE.

This is a petition for review of the decision of the Board of Tax Appeals approving a deficiency in estate tax of the Estate of Winifred H. Kinney, deceased, in the sum of $3968.07.

The deficiency was the amount of the tax on a one-ninth interest in a trust fund, at the valuation determined by the Commissioner. The petitioners dispute both the amount of the tax, and the ownership by the estate of any taxable interest in the trust fund.

The facts are briefly as follows:

Winifred H. Kinney died December 6th, 1927. She was the wife of Abbot Kinney, who predeceased her and died in November 1920. Abbot Kinney, in the year 1918, created a trust by declaration, a copy of which appears in full in the Transcript, page 21 *et seq.* In brief, it declared that he held the legal title to all except three shares of stock of Abbot Kinney Company, a corporation. As trustee he had the power to manage the same, and receive the rents and profits and pay them "for the support and maintenance of" certain members of his family, to wit: One-sixth to each of four children by a former marriage, and the balance "to Winifred H. Kinney for the support and maintenance of herself, and for the support and maintenance of the two minor children of Abbot Kinney, to wit: Helen Kinney and Clan Kinney, to be controlled and applied by said Winifred H. Kinney, one-third (⅓);" etc.

During his lifetime he retained the right to act as sole trustee, to revoke the trust, and to use half the rents and

profits for his own purposes. In case of his death, the vacancy was to be filled by four of the named beneficiaries. [Tr. p. 22.]

It further provided that the trust should terminate 12 years after the death of Abbot Kinney [Tr. p. 22], and that upon the termination "the title to the whole of said property, so held in trust, *shall immediately vest* in the above named beneficiaries by title absolute, in the same proportion above named for rents and profits and the said one-third (⅓) above set forth for the support of Winifred H. Kinney, Helen Kinney and Clan Kinney, *will pass to them* in equal shares by absolute title."

Winifred H. Kinney joined in the Trust, declaring the property was the sole and separate property of Abbot Kinney, and renounced "all claims to said property as community property or otherwise, and sets the same apart as the sole property and estate of said Abbot Kinney."

The matter was submitted to the Board of Tax Appeals on an agreed statement of facts [Tr. p. 19].

The executors of Winifred H. Kinney's estate (one of whom has since resigned and been succeeded by an administratrix with the will annexed) contended that the deceased had no vested interest in the *corpus* of this fund at the time of her death. The Commissioner contended she had such interest, to wit: a vested interest in 1/9th of the *corpus,* and levied the deficiency tax of $3968.07, basing the tax on one-ninth of the full book value of the stock. This was done in spite of the fact that the trust had not terminated in 1927 when Winifred H. Kinney died, and could not terminate until 1932.

C.

STATUTES AND REGULATIONS INVOLVED.

Revenue Act of 1926, Sec. 302:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death; * * *"

Reg. 70, Art. 13:

"General.—The value of all property includable in the gross estate is the fair market value thereof at the time of the decedent's death. The fair market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the decedent's death, and it is shown that the selling price reflects the fair market value thereof as of the date of decedent's death, the selling price will be accepted. Neither depreciation nor appreciation in value subsequent to the date of decedent's death will be considered. All relevant facts and elements of value should be considered in every case.

* * *

"Stock in a close corporation should be valued upon the basis of the company's net worth, earning and dividend-paying capacity, and all other factors having a bearing upon the value of the stock. Complete financial and other data upon which the estate basis its valuation should be submitted in duplicate with the return.

"Where as to any particular security conditions of sale or ownership are such that the fair market value, determined as already indicated, would not afford a proper basis for valuation, the Commissioner, on final audit, will establish the value by considering all relevant factors."

D.

ASSIGNMENT OF ERRORS RELIED UPON.

First: That the said United States Board of Tax Appeals erred in deciding that, at the date of her death, the deceased, Winifred H. Kinney, had a vested interest in the *corpus* of a certain trust made by Abbot Kinney in his lifetime.

Second: The United States Board of Tax Appeals erred in deciding that the trust agreement created an executed trust which gave to the beneficiaries not only the income from the trust estate during its life, but a vested interest as remaindermen in the *corpus* which became absolute at its termination.

Third: That the United States Board of Tax Appeals erred in approving the fixing of the value of decedent's interest in the trust as the agreed net worth of the Abbot Kinney Company's assets on the date of death and dividing it by nine.

Fourth: That the United States Board of Tax Appeals erred in holding that the sale of interests in the trust two years and six months after the decedent's death was too remote in point of time to serve as a guide in determining values on the basic date.

Fifth: That the United States Board of Tax Appeals erred in disregarding said sale in the fixing of the value of decedent's alleged interest.

Sixth: That the United States Board of Tax Appeals erred in disregarding the testimony of certain bank officials which was stipulated to, as to the value of decedent's interest in the trust estate.

E.

ARGUMENT.

There are two principal questions involved, the first arising out of the first two Assignments of Error, and the second out of the remaining assignments.

I.

Did the Trust Instrument Create a Vested Interest in the Corpus in Winifred H. Kinney?

It is to be noticed at the outset that in the trust instrument Winifred H. Kinney renounced all claims to the property as community property, or otherwise. The trustor covenanted that he held the legal title for certain *uses and purposes*—not for certain *persons*. These purposes were to apply the rents and profits to the *support and maintenance* of seven named individuals, in certain fractions.

Obviously these persons could be supported and maintained only up to the date of their respective deaths, and the benefit would cease upon their death.

Upon the termination of the trust at the end of twelve years after trustor's death, it provides that title *"shall immediacly* vest" in the before-named beneficiaries by title absolute [Tr. p. 22), and the one-third for the support of Winifred H. Kinney, Helen Kinney and Clan Kinney *"will pass"* to them in equal shares. [Tr. p. 23.]

There are no words of present grant anywhere in the instrument. There are *no granting* words at all, except those quoted in the last paragraph. It is apparent, therefore, that the trustor did not intend the *corpus* to vest at all until the termination of the trust. The words "shall . . . vest" and "will pass" leave no room for doubt. They follow in the same sentence which begins: "Upon the termination of the trust . . .", and obviously refer to the future. Otherwise, they can have no meaning at all.

The intention of the trustor is the determining factor in the construction of such a document.

26 Cal. Jur. 1014; *Estate of Blake*, 157 Cal. 448, 458, 108 Pac. 287; *Cal. Civil Code*, Sec. 1636.

Logically, and according to well established rules of construction, that intention is to be established principally from the words of the instrument itself.

Cal. Civil Code, Secs. 1638, 1639.

The Board of Tax Appeals in its decision attempts to construe the instrument from its "four corners." [Tr. p. 58.] However, it overlooks that cardinal rule of construc-

tion that every part, and *every word*, is to be given effect, if such construction is practicable.

> *Cal. Civil Code*, Sec. 1641; *Cal. Code of Civil Proc.*, Sec. 1658; 6 *Cal. Jur.* 259; *Purdy v. Buffums*, 95 Cal. App. 299, 303.

The Board of Tax Appeals held that a vested remainder in the *corpus* was given to the various beneficiaries. [Tr. pp. 58-59.] The authorities cited in the decision [Tr. p. 59] do not sustain such a theory under the present facts. In any event, it is certain that a claimant for a share of the *corpus* could not base his claim for a share of this trust on such a loose "four-corner" construction, for there is not a single granting word in the instrument excepting those providing for vesting upon the termination. Whatever may be the rule in other cases is unimportant under the particular facts here.

If a claim for a share of the *corpus* could not be substantiated, it is obvious there is nothing to tax.

It is unnecessary to determine in this proceeding whether the portion of the trust property in question reverted to the estate of the trustor, Abbot Kinney, or what disposition was made of it, for the estate tax in the Winifred H. Kinney estate could only attach upon the theory that title in the *corpus* vested during her lifetime. Nor does the fact that she attempted to dispose of any interest she might have under the trust instrument in her will make any difference, for she had definitely *renounced* all interest, and could create none by such a provision in her will.

II.

Even if Winifred H. Kinney Left a Taxable Share, It Was Excessively Taxed by the Commissioner.

If petitioner's contention on the first point made be incorrect, and it should be held that Winifred H. Kinney left a vested interest in one-ninth of the estate (which, of course, we do not concede), nevertheless, the tax was improperly assessed.

The Commissioner based the tax on the value of the entire capital stock as reflected by the net worth of the company's assets at the date of death of Winifred H. Kinney. The amount of such net worth was stipulated to. [Tr. p. 27.]

In 1927, at Winifred H. Kinney's death, the right to rents and profits ceased. There remained no right to vote the stock, or exercise any act of ownership over it. Unquestionably the "vested remainder" of the Winifred H. Kinney estate—assuming it owned such a remainder—which was definitely tied up for 5 years, did not have the identical value of stock free from such restrictions.

Could a rational person suggest that such an interest might be sold by the executors for the proportionate value of the corporation's assets, where the purchaser would have to wait 5 years before he could enjoy any benefit from his investment?

The Court has judicial notice of the nationwide depression which started in 1929—halfway through the period from the death of Winifred H. Kinney and the time when the stock would become free of the trust. With this in

mind, is it reasonable to believe this "vested remainder"—an interest in stock which could not become absolute until 1932—was reasonably worth the proportionate value of the corporation's assets in 1927, when it was quite likely the corporation would be in receivership or bankruptcy before the interest became absolute?

The executors contended the value was, at most, not over 50 per cent of the free pro rata value of one-ninth of the company's assets. This was supported by the testimony of C. C. Hogan, Trust Officer of Security-First National Bank of Los Angeles, W. D. Newcomb, Jr., President of First National Bank of Venice, and Herbert Hertel, Manager of Security-First National Bank, Venice Branch. This testimony was received under stipulation of facts that these men would so testify, if called as witnesses. The first estimated the value as 50 per cent of the pro rata value, the second as 25 per cent., and the third as 33⅓ per cent. No question was raised as to the competency of this testimony, or the qualification of these witnesses. [Tr. p. 28.]

There were no sales of stock. There were, however, certain sales of beneficial interests, evidence of which was introduced. They showed a valuation of $133,000.00 for a 1/6th interest, on which basis a one-ninth interest would have had a value of $88,666.67. These sales were stipulated to [Tr. p. 27] and the agreements were introduced in evidence [Tr. p. 29 *et seq.*).

While these sales were made two years after Winifred H. Kinney's death, they were made during the period before the vesting became absolute. Being the only sales, they were entitled to some weight. The balance sheet of the corporation near the date of these sales was also

introduced and stipulated to [Tr. p. 27] which gave a fair basis for comparison.

The Board of Tax Appeals passed lightly over all of this testimony as to value, terming the bankers' testimony "vague opinions", which are "not evidence." There being no sales, other than those in evidence, what other evidence could there be than opinions of those familiar with such transactions?

No testimony was offered by the Commissioner other than the net worth, as shown by the balance sheet. By Article 13, Regulations 70, (*supra*) the valuation of the stock of a close corporation should not only be upon the company's net worth, but its earning and dividend paying capacity, and all other factors having a bearing on the value of the stock. Certainly the impounding of this stock in a trust is a factor having a bearing on its value. No testimony was offered by the Commissioner on this phase, and the testimony was therefore undisputed that such interest was worth not over 50 per cent of the fractional net worth.

Petitioners believe that the order of the Board of Tax Appeals should be reversed.

Respectfully submitted,

R. C. GORTNER,

Attorney for Sherwood Kinney, Executor of the Estate of Winifred H. Kinney, deceased.

HAROLD J. CASHIN,

Attorney for Helen Kinney Gerety, Administratrix with Will Annexed of the Estate of Winifred H. Kinney, deceased.

No. 7639

In the United States Circuit Court of Appeals for the Ninth Circuit

ESTATE OF WINIFRED H. KINNEY, DECEASED, BY SHERWOOD KINNEY AND R. C. GORTNER, EXECUTORS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

FRANK J. WIDEMAN,
Assistant Attorney General.

SEWALL KEY,
ELLIS N. SLACK,
Special Assistants to the Attorney General.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 7639

ESTATE OF WINIFRED H. KINNEY, DECEASED, BY Sherwood Kinney and R. C. Gortner, Executors, petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the Board of Tax Appeals (R. 54–61), which is reported at 30 B. T. A. 604.

JURISDICTION

This appeal involves estate taxes in the amount of $3,968.07, and is taken from a decision of the Board of Tax Appeals entered on May 5, 1934 (R. 62). The case is brought to this Court by petition for review filed July 30, 1934 (R. 62–69), pursuant to the provisions of Sections 1001–1003

of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

QUESTIONS PRESENTED

1. Whether the decedent at the time of her death owned a vested interest in one-ninth of the corpus of a certain trust created by decedent's husband.

2. The Commissioner determined the value of such interest to be $201,567.10. Was there sufficient evidence before the Board to overcome the presumption of correctness attaching to the Commissioner's determination?

STATUTE AND OTHER AUTHORITIES INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, provides in part as follows:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death; * * * (U. S. C. App., Title 26, Sec. 1094).

Treasury Regulations 70, promulgated under the Revenue Act of 1926:

> ART. 13. *Valuations.*—(1) *General.*—The value of all property includible in the gross estate is the fair market value thereof at the time of the decedent's death. The fair market value is the price at which property

would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the decedent's death, and it is shown that the selling price reflects the fair market value thereof as of the date of decedent's death, the selling price will be accepted. Neither depreciation nor appreciation in value subsequent to the date of decedent's death will be considered. All relevant facts and elements of value should be considered in every case.

* * * * * *

Stock in a close corporation should be valued upon the basis of the company's net worth, earning and dividend-paying capacity, and all other factors having a bearing upon the value of the stock. Complete financial and other data upon which the estate bases its valuation should be submitted in duplicate with the return.

Deering's Civil Code of California, 1931, provides:

§ 690. *Future interest, what.*—A future interest entitles the owner to the possession of the property only at a future period.

§ 693. *Kinds of future interests.*—A future interest is either:

1. Vested; or
2. Contingent.

§ 694. *Vested interests.*—A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the

property, upon the ceasing of the intermediate or precedent interest.

§ 695. *Contingent interests.*—A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.

STATEMENT

The facts may be summarized as follows (R. 19–53):

The decedent, Winifred H. Kinney, died testate on December 6, 1927 (R. 19). On October 28, 1918, Abbot Kinney executed a trust instrument, the material parts of which read as follows (R. 20–23):

> (2) That Abbot Kinney of Los Angeles County, California, herein designated the trustee, does hereby covenant and declare that he has and holds the legal title to the following described property in trust for the uses and purposes hereinafter expressed, to wit:
>
> (3) All shares of stock owned by and all shares standing in the name of Abbot Kinney on the books of the company in the Abbot Kinney Company, a corporation, organized under the laws of California, and which said title and ownership of shares includes all shares heretofore issued by said company, except three (3) shares.
>
> (4) That said trustee shall have the power to sell, transfer, convey, and mortgage all or any of said property, and to receive the rents and profits from said property, and as incidental thereto to manage said prop-

erty and vote all shares of stock, and to pay and apply said rents and profits for the support and maintenance of the following-named persons, in the proportions hereinafter stated, to wit:

(5) To Thornton Kinney one-sixth (⅙); to Sherwood Kinney one-sixth (⅙); to Innes Kinney one-sixth (⅙); to Carleton Kinney one-sixth (⅙); to Winifred H. Kinney for the support and maintenance of herself, and for the support and maintenance of the two minor children of Abbot Kinney, to wit: Helen Kinney and Clan Kinney, to be controlled and applied by said Winifred H. Kinney, one-third (⅓); provided however that during the life of Abbot Kinney, trustee above named, he shall act as the sole trustee under this declaration of trust, and he being the sole trustor and maker of this trust shall have the power to revoke this trust at any time during his lifetime, and during his lifetime he reserves and shall have the right to receive and to apply one-half of all the rents, income, and profits from the property above described for his sole use as he may determine.

* * * * *

(7) Upon the termination of this trust, unless revoked, the title to the whole of said property, so held in trust, shall immediately vest in the above-named beneficiaries by title absolute, in the same proportions above named for rents and profits and the said one-third (⅓) above set forth for the sup-

port of Winifred H. Kinney, Helen Kinney, and Clan Kinney, will pass to them in equal shares by absolute title.

* * * * *

(11) Winifred H. Kinney, wife of said Abbot Kinney, hereby joins in this instrument, and hereby declares that all of said property transferred in trust as aforesaid is the separate property and estate of said Abbot Kinney, subject to his disposition and control, and hereby renounces all claims to said property as community property or otherwise, and sets the same apart as the sole property and estate of said Abbot Kinney.

Abbot Kinney died in November 1920 (R. 20), and by the terms of the trust instrument the trust was to terminate twelve years after such date (R. 22).

The fair market value of the Abbot Kinney Company on December 6, 1927, the date of decedent's death, was $2,791,616.84, its liabilities on such date were $977,512.91, leaving a net fair market value of $1,814,103.93 (R. 27). On July 1, 1930, Innes Kinney sold a one-sixth beneficial interest in the Abbot Kinney Trust to Carleton Kinney for a recited consideration of $133,000. On August 5, 1930, Thornton Kinney sold a one-sixth beneficial interest in said trust to Sherwood Kinney for a recited consideration of $133,000 (R. 27 and Exs. A and B, R. 29–53). The net worth of the Abbot

Kinney Company on June 30, 1930, as shown by its books, was $1,438,016.60 (R. 28).

It was stipulated that if C. C. Hogan, Trust Officer, Security-First National Bank of Los Angeles, were called as a witness he would testify that in his opinion Mrs. Kinney could not have sold her interest in the trust for more than 50 percent of the pro rata value of one-ninth of the capital stock of the corporation in 1927; that if W. D. Newcomb, Jr., President of the First National Bank, Venice, California, were called as a witness he would testify that the market value of Mrs. Kinney's interest in the trust in 1927 was not in excess of 25 percent of the fractional net worth of the corporation; that Herbert Hertel, Manager, Venice Branch, Security-First National Bank of Los Angeles, if called as a witness would testify that in his opinion Mrs. Kinney's beneficial interest was worth 33⅓ percent of the fractional net worth of the corporation's assets in 1927 (R. 28–29).

By a codicil to her will the decedent bequeathed her beneficial interest in the trust to her two children (R. 25).

In filing the estate tax return the executor did not include in the gross estate the value of decedent's interest in the Abbot Kinney Trust. The Commissioner held that the value of such interest was a part of decedent's gross estate and determined the value to be one-ninth of the fair market value of the assets of Abbot Kinney Company as

of December 6, 1927, or $201,567.10 (R. 25), and determined a deficiency in the amount of $3,968.07 (R. 13). The Commissioner's determination was affirmed by the Board of Tax Appeals (R. 62).

SUMMARY OF ARGUMENT

1. If decedent's interest in the Kinney Trust was vested, it formed a part of her gross estate.

The law favors vested, rather than contingent remainders, and this is particularly true under the California law, where every interest is presumed to be vested unless a contrary intention is clearly manifest. A future interest is vested when there is a person in being who would have a right to immediate possession of the property upon the ceasing of the precedent interest. Obviously the decedent's interest was vested, and the value thereof should be included in her gross estate.

2. The decedent owned a one-ninth interest in the Kinney Trust, and the Commissioner determined the value of such interest to be $201,567.10. This value was found by taking one-ninth of the fair market value of the assets of the Abbot Kinney Company, whose stock comprised the corpus of the trust. The only other evidence before the Board as to the value of the interest was the unsupported opinion of three banking officials and a record of two sales in 1930, over two and a half years after the basic valuation date. Such evidence falls far short of overcoming the presumption of correctness attaching to the Commissioner's determination.

ARGUMENT

I

The decedent has a vested interest in the Abbot Kinney Trust, and the value of such interest forms a part of her gross estate

The sole question presented under this issue is whether the decedent, Winifred H. Kinney, had a vested interest in the trust estate created by Abbot Kinney on October 18, 1918. If her interest was vested, it should be included in the gross estate; if it was contingent, it should be excluded. *Commissioner* v. *Rosser,* 64 F. (2d) 631 (C. C. A. 3d).

Section 694 of Deering's Civil Code of California (1931) provides that a future interest is vested when there is a person in being who would have a right to immediate possession of the property upon the ceasing of the intermediate or precedent interest. Section 695 provides that a future interest is contingent while the person in whom, or the event upon which, it is limited to take effect remains uncertain.

The classic definition of vested and contingent remainders is to be found in Gray's "The Rule Against Perpetuities" (3d Ed.), Sec. 9, where it is said (p. 5):

> Remainders are either vested or contingent. A remainder is vested if, at every moment during its continuance, it becomes a present estate, whenever and however the preceding freehold estates determine. A re-

> mainder is contingent if, in order for it to become a present estate, the fulfilment of some condition precedent, other than the determination of the preceding freehold estates, is necessary. * * *

In *Estate of Washburn,* 11 Cal. App. 735, 106 Pac. 415, the court said in distinguishing between vested and contingent remainders (p. 740):

> The broad distinction between vested and contingent remainders is this: In the first, there is some person *in esse* known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose *right* to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. It may never happen, or it may not happen until after the particular estate upon which it depends shall have terminated, so that the estate in remainder will never take effect.

It is generally said that the law favors vested, rather than contingent estates, and this is particularly true under the California law. *Estate of Washburn, supra; Williams* v. *Williams,* 73 Cal. 99, 14 Pac. 394. In the latter case the will provided that three years after testator's death the executor was to pay to Percy Williams the sum of $50,000. The question involved as stated by the court was (p. 101):

> Whether or no said legacy or devise of fifty thousand dollars to defendant Percy Williams is an absolute and vested estate in him, and of which the time of enjoyment only is postponed until distribution, so that on his death, before distribution, intestate, it would pass to his legal heirs, or could now be transmitted by his will or conveyed by deed, as he might desire; * * *.

In holding that he had a vested interest the court said (p. 102):

> The law favors the vesting of interests, and every interest will be presumed to be vested, unless a contrary intention is clearly manifest. * * *
>
> It would seem to follow, then, as a matter not admitting of doubt, that under the provisions referred to, the interest of Percy in this share is a vested future interest in fee, which will pass by grant, devise, or succession, and which he may alienate at his pleasure. If he should die before distribution without such alienation, it will vest in his heirs, devisees, or legatees.

The instant case meets every requirement of the definition of a vested interest. The decedent was in being and there was no contingency that could defeat her right to possession upon the termination of the precedent estate. She had such a vested interest that she could have sold it or given it away at her pleasure. In fact, she must have considered her interest vested, because by a codicil to her will

she left her one-ninth interest in the trust to her two children.

Petitioners argue that since there were no granting words in the trust instrument, except those contained in the paragraph which provides that the title to the trust property shall immediately vest in the beneficiaries upon the termination of the trust, the interest of the decedent could not have been vested. But it was not necessary for the instrument to contain granting words because the instrument, as executed, created an executed trust, which gave to the beneficiaries not only the income from the trust but a vested interest in the corpus. Obviously what was meant by the provision was that upon the termination of the trust the legal title should vest in the beneficiaries—the equitable title having already vested.

A case similar in all respects to the instant one is that of *Estate of Fair,* 132 Cal. 523, 525, 60 Pac. 442. There the testator left his estate to trustees "to have and to hold the same, in trust, during the lives" of his children, on the death of the survivor to his brothers and sisters. The court held that upon the death of the testator the persons entitled to the remainder took a vested interest therein, and that the provision directing the trustees to convey to them was unnecessary.

The situation in the instant case is briefly this: Abbot Kinney, by an instrument dated October 28, 1918, created a trust which was revocable by him-

self at any time during his lifetime and which was to terminate twelve years after his death. Upon his death in 1920, the trust became irrevocable, and each of the beneficiaries became entitled to their portion of the income of the trust during its life and to the corpus upon its termination. Obviously the interest of the decedent was vested, and its value should be included in her gross estate.

II

The Commissioner determined the value of the decedent's interest in the Abbot Kinney Trust to be $201,567.10, and there was not sufficient evidence before the Board to overcome the presumption of correctness attaching to the Commissioner's determination

Petitioners argue in the alternative, that if it be decided that the decedent had a vested interest in the trust in question, the Commissioner's determination of the value of such interest was excessive.

The Abbot Kinney Trust was the owner of all the issued and outstanding capital stock of the Abbot Kinney Company, and it was stipulated before the Board that on December 6, 1927, the date of decedent's death, the fair market value of the assets of such company was $2,791,616.84; its total liabilities amounted to $977,512.91; leaving a fair market value of $1,814,103.93 for the net assets as of the date of decedent's death. As the decedent owned a one-ninth interest in the trust, the Commissioner determined the value of such interest to be one-ninth of $1,814,103.93, or $201,567.10.

It was stipulated that on July 1 and August 5, 1930, over two years and a half after the date of decedent's death, Innes Kinney and Thornton Kinney, respectively, each sold their one-sixth interest in the Abbot Kinney Trust for a recited consideration of $133,000 (R. 27); that the net worth of the Abbot Kinney Company, as shown by its books, on June 30, 1930, was $1,438,016.60; that if certain banking officials were called as witnesses, one would testify that the decedent's interest in the trust could not have been sold for more than 50 percent of the pro rata value of one-ninth of the capital stock of the corporation in 1927; another would testify that the value of decedent's interest in the trust in 1927 was not in excess of 25 percent of the fractional net worth of the corporation; and another would testify that in his opinion the decedent's interest was worth 33⅓ percent of the fractional net worth of the corporation's assets in 1927.

It is well settled that the determination of the Commissioner is prima facie correct, and the burden is on the taxpayer of proving the determination to be erroneous. *Old Mission P. Cement Co.* v. *Commissioner,* 69 F. (2d) 676 (C. C. A. 9th); *Am-Plus Storage Battery Co.* v. *Commissioner,* 35 F. (2d) 167 (C. C. A. 7th); *Avery* v. *Commissioner,* 22 F. (2d) 6 (C. C. A. 5th). It is likewise true that the value of decedent's interest in the Abbot Kinney Trust was an issue of fact, and the

finding of the Board must be sustained if based upon any substantial evidence. *Phillips* v. *Commissioner,* 283 U. S. 589.

The opinion testimony of the three banking officials was entitled to no weight whatsoever. The purpose of expert testimony is to assist and guide the Board or jury in understanding the facts, but where as here, it is not shown what facts were taken into consideration by the witnesses in arriving at their opinion of the value of decedent's interest, their testimony is valueless. The only thing in the stipulation that would tend to qualify them as experts, so that their opinion would be admissible as evidence, is the statement that they are connected with certain banks. But such fact standing alone does not qualify them as experts. It was not shown that any one of the three had any knowledge or information whatsoever concerning the Abbot Kinney Trust. From what is shown in the record, they may never have heard of it. Nor was it shown that they had ever had any experience in valuing stocks of a corporation or its assets.

We next come to the sales made by two of the beneficiaries in July and August 1930 of their interests in the trust. Each sold a one-sixth interest in the trust to two of the other beneficiaries for the sum of $133,000. The net worth of the Abbot Kinney Company, as shown by its books on June 30, 1930, was $1,438,016.60. Petitioners argue that such sales indicate that the value of decedent's

interest was less than that determined by the Commissioner. But it will be observed that such sales were made over two and a half years after December 6, 1927, the basic valuation date, and are therefore too remote to serve as a guide in determining the value of decedent's interest. It will also be observed that the Commissioner based his valuation upon the *fair market value* of the assets of the company on December 6, 1927, and that there was no evidence before the Board as to fair market value of the assets at or near the sales date. It is true, the Board had before it a copy of the company's balance sheet as of June 30, 1930, but that shows only the book value of the assets which may be much more or much less than the fair market value, depending on the circumstances in each case. Manifestly, without knowing what the fair market value of the assets were on such date, the evidence concerning the sales does not furnish any basis for comparison.

It will be noted that the sales were made between members of the Kinney family, and the wording of the sales agreements indicates that there were probably numerous other considerations which were not recited therein. Further, on account of the great slump in the market value of securities in 1929 and 1930, of which this Court will take judicial notice, a sale in 1930 would not furnish any guide for determining value in 1927.

In the absence of sales on the market of the shares of stock comprising the trust, the only proper method of determining the value of decedent's interest is to take the fair market value of the assets of the company. This the Commissioner did and found decedent's interest to be of the value of $201,567.10, and the only evidence before the Board tending to show a different value is that referred to above. Obviously such evidence falls far short of overcoming the presumption of correctness attaching to the Commissioner's determination.

CONCLUSION

It follows that the decision of the Board of Tax Appeals is correct, is in accordance with law, and should be affirmed.

Respectfully submitted.

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